CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 127

RADIO CORPORATION OF AMERICA, PETITIONER,

vs.

RAYTHEON MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 14, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 127

RADIO CORPORATION OF AMERICA, PETITIONER,

vs.

RAYTHEON MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

INDEX.

	Original	Print
Proceedings in U. S. C. C. A., First Circuit	1	1
Caption [omitted in printing]	1	1
Record from D. C. U. S., District of Massachusetts	1	1
Writ of attachment and marshal's return	1	1
Memorandum re declaration	3	2
Declaration as amended	3	3
Disclaimer	13	12
Second Count of Plaintiff's Declaration	14	13
Defendant's Motion to Strike, etc. (denied)	24	23
Demurrer (overruled)	25	23
Minute Entries	28	27
Defendant's Answer as amended	29	28
Motion to transfer to Equity	30	28
Extracts from Defendant's Motion for Specifications	30	29
Hearing on Motions; Minute entries	31	30
Plaintiff's Motion for framing Jury Issues (denied)	32	31
Motion to amend Defendant's Answer (allowed)	32	31
Extracts from Plaintiff's Bill of Particulars	35	34
Minute entries	35	35

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 30, 1935

—7050-C

	Original	Print
Plaintiff's Motion to Rescind or to Vacate or to Supersede Order allowing Transfer to Equity (denied)	37	36
Hearing on Motion; Minute entry	39	37
Motion for Entry of Final Decree	39	38
Findings of Fact and Conclusions of Law	40	39
Final Decree	41	40
Claim of Appeal and allowance thereof; minute entry	42	40
Bill of Exceptions re Motion for Transfer	42	41
Motion to amend Bill of Exceptions (allowed)	43	41
"A" and "B"—Release	43	41
Bill of Exceptions re Motion for Framing Jury Issues	56	54
Bill of Exceptions re Motion to Rescind Order allowing Transfer	57	55
Bill of Exceptions re Motion for entry of Final Decree	58	56
Petition for Appeal	63	61
Assignment of Errors	63	61
Bond and citation; Recital as to,	64	62
Plaintiff's Praecipe for record	64	62
Defendant's Cross-Praecipe for record	65	63
Certificate of Clerk (omitted in printing)	66	
Memorandum re orders enlarging time	67	64
Opinion, Morris, J.	69	64
Minute entry of hearing	84	76
Final Decree	84	77
Recital as to order denying rehearing	84	77
Recital as to order staying mandate	84	77
Clerk's certificate (omitted in printing)	84	
Order allowing certiorari	86	77

[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

Law Docket

No. 5021

RAYTHEON MANUFACTURING COMPANY

v.

RADIO CORPORATION OF AMERICA

WRIT AND RETURN—Filed Dec. 14, 1931

[L. S.] MASSACHUSETTS DISTRICT, ss:

The President of the United States of America, to the Marshal of Our District of Massachusetts, or His Deputy, Greeting:

We command you to attach the goods or estate of Radio Corporation of America, a corporation duly organized under the laws of the State of Delaware and a citizen of that State, which continuously at all times alleged in this case and now is found in the District of Massachusetts and [fol. 2] continuously at said times had and now has an agent therein and at all said times continuously has transacted and now transacts business in our District of Massachusetts, defendant, to the value of fifteen million (15,000,000) dollars, and the said corporation to summon (if it may be found in your district), to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the third Tuesday of March, 1932. Then and there, in our said court, to answer unto Raytheon Manufacturing Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts on or about July 7, 1922 under the name American Appliance Company subsequently changed to Raytheon Manufacturing Company and subsequently changed to Raytheon, Inc., a citizen, resident, inhabitant of

the Commonwealth of Massachusetts having its usual place of business at Cambridge in said Commonwealth, incorporated also under the laws of the State of Delaware for the benefit also of which said corporation this action is brought, plaintiff, in an action of tort arising under Title 15, Chapter 1, Section 15, of the Code of Laws of the United States.

To the damage of the said plaintiff (as it says) the sum of fifteen million dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, the Honorable James M. Morton, Jr., at Boston, the fourteenth day of December, in the year of our Lord one thousand nine hundred and thirty-one.

Helen I. Tweedy, Deputy Clerk.

Officer's Return on Writ

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, December 14, 1931.

Pursuant hereunto I have this day at eleven o'clock and 55 minutes A. M., attached a chip as the property of the within-named Radio Corporation of America, and thereafter on the same day I summoned the within-named defendant, Radio Corporation of America, to appear at court and answer as within directed, by giving in hand to Henry [fol. 3] F. Long, Commissioner of Corporations for the Commonwealth of Massachusetts, two true and attested copies of and two original summons to this writ, together with $2, his statutory fee for acceptance of service hereon.

William J. Keville, United States Marshal, by J. A. Gately, Deputy.

[Memorandum. Copy of declaration filed December 14, 1931, is here omitted, as the declaration was subsequently amended and appears of record as amended. James S. Allen, Clerk.]

In United States District Court

Declaration as Amended by Disclaimer and by a Second Count

[Original Declaration Filed December 14, 1931; Disclaimer Filed March 5, 1932; Second Count Filed March 22, 1932.]

1. The plaintiff, Raytheon Manufacturing Company, is a corporation duly organized under the laws of the Commonwealth of Massachusetts in 1922 under the name American Appliance Company, subsequently changed to Raytheon Manufacturing Company, and subsequently changed to Raytheon, Inc., and a citizen, resident and inhabitant of the Commonwealth of Massachusetts having its usual place of business at Cambridge in said Commonwealth, and incorporated also in 1928 under the laws of the State of Delaware, for the benefit also of which said corporation this action is brought.

2. The defendant, Radio Corporation of America, is a corporation duly organized under the laws of the State of Delaware and is a citizen of that State and was continuously at all times hereinafter stated and now is found in the District of Massachusetts, and continuously at said times had and now has an agent therein and at all said times continuously has transacted and now transacts business therein.

3. The plaintiff for itself and for the benefit of said Raytheon Manufacturing Company, organized under the laws of the State of Delaware, brings this action to recover the sum of exceeding nine million dollars as threefold damages [fol. 4] and for the cost of suit, including a reasonable attorney's fee for the matters and things hereinafter set forth.

4. The plaintiff has been injured in its business and property by reason of the things done by the defendant, hereinafter set forth, forbidden in the Anti-Trust Laws of the United States, whereby the plaintiff has suffered damages in its business and property in a sum in excess of three million dollars, which the plaintiff claims to recover threefold under Title 15, Chapter 1, section 15, of the Code of Laws of the United States.

5. The defendant has made contracts and engaged in a combination and conspiracy in restraint of trade and commerce among the several States and thereby has attempted to monopolize and has monopolized and has combined and conspired with others to monopolize trade and commerce among the several States and, when so engaged in said commerce and as a part of said conspiracy and in carrying the said conspiracy out, has in the course thereof made leases and contracts on the condition, agreement and understanding that the lessee or licensee shall not use or deal in the goods of competitors of the defendant and where the effect of such lease and contract and agreement and understanding was to tend to create a monopoly in a line of commerce in violation of Title 15, chapter 1, sections 1 and 2, of the Code of Laws of the United States in the respects hereinafter set forth, and solely by the illegal conjunction of said acts has injured the plaintiff in its business and property in the manner and to the extent hereinafter set forth.

6. The plaintiff in the year 1926 was engaged in the manufacture, distribution in interstate commerce, and sale in interstate commerce, of tubes known as Raytheon rectifying tubes for use with radio receiving sets. The plaintiff had developed this tube through periods of prior experimentation and had expended large sums of money therein and in introducing this tube into use in interstate commerce by manufacturers of radio receiving sets and by dealers in such sets and had created and then possessed a large and valuable good will in this interstate commerce and then had a large and profitable established interstate business [fol. 5] therein, so that for the year 1926 the net profits of said business actually realized and received were $454,935. Said business then had an established prospect of large increase and said business and the good will thereof was of a present value of exceeding three million dollars.

7. Prior to the year 1926 the defendant was engaged in interstate and foreign commerce in divers kinds of radio apparatus and in radio communication. When so engaged the defendant formed the plan and conspired to suppress, restrict and destroy all competition of others in this branch of interstate and foreign commerce and to monopolize that commerce. A large number of other concerns were at this time engaged in this branch of interstate and foreign com-

merce in competition with the defendant and there was then an established prospect of a substantial expansion of this interstate and foreign competition.

8. At this time there were many devices either necessary or desirable for the successful operation of radio receiving apparatus which were the subject of Letters Patent of the United States, owned by independent individuals, firms and corporations, and these were independent sources of supply for radio apparatus dealers and manufacturers who could obtain by negotiation with these independent competitors the patented articles and leases and licenses under the patents to manufacture and sell and use such articles.

9. For the purpose aforesaid and pursuant to the plan and conspiracy aforesaid the defendant conspired with several of these independent owners of Letters Patent, and of devices for radio receiving apparatus, to acquire as many as possible of these patents or exclusive licenses thereunder. Many of these patents were for competitive devices. Some of these licenses were absolutely exclusive, and others were exclusive with limited exceptions which would not interfere in actual conduct of business with the defendant's monopoly.

10. The defendant carried out this conspiracy and obtained this monopoly in the manner planned, and so completely that by the year 1927 it was practically impossible [fol. 6] for manufacturers or dealers in commercially vendable radio receiving sets of the standard demanded by the purchasing public to manufacture or to sell such a set without the consent of the defendant with respect both to devices for which the defendant held the patent and to devices for which the defendant held no patent.

11. The defendant has full knowledge of the various conveyances, agreements, leases, licenses, understandings and methods whereby the defendant has accomplished this monopoly, and the plaintiff has not first-hand knowledge of any of them, but has reliable information as to many of them. The plaintiff abstains from setting them forth in this declaration, because such allegations would involve the names of other persons, firms and corporations not parties to this suit.

12. By the year 1927 the defendant had so far perfected this unlawful monopoly in interstate commerce in radio

receiving set apparatus that wholly by reason thereof it exerted by its illegal acts an illegal duress upon all those engaged in this branch of interstate commerce so that they were compelled involuntarily to deal with the defendant upon such terms as the defendant dictated or to cease business.

13. In the progress of this industry up to the beginning of the year 1927, it was the regular course of business for manufacturers of radio receiving sets to manufacture them and to sell them to jobbers and to dealers without tubes and for the jobbers or the dealers to procure tubes in the open market with which to equip them on or after the retail sale of them.

14. Radio receiving sets in ordinary course outlast the tubes first supplied with them. There is a recurring business in the supply of tubes to take the place of those worn out in use. It is the ordinary course of this business that the owner of a radio receiving set seeks replacement tubes of the same kind as those supplied with the set originally. As a result of this, control of the kind of tubes originally installed in the set or initially supplied for its use is in practice a control of the entire replacement business.

15. At the beginning of the year 1927 the defendant had [fol. 7] no legitimate control over the trade and commerce either intrastate, interstate, or foreign in radio receiving set tubes; but it was competing in the interstate and foreign commerce for the radio tube business and was in competition in that interstate and foreign commerce with the plaintiff.

16. By the beginning of 1927 the plaintiff had produced in the Raytheon rectifying tube the best rectifying tube for a radio receiving set that has been manufactured up to the present time.

17. By the beginning of 1927 the plaintiff was doing approximately eighty-five percent of the business in rectifier tubes of the entire United States. The plaintiff was selling and shipping these tubes in interstate commerce throughout the United States. The plaintiff had a large interstate trade with radio set manufacturers, jobbers, dealers and laboratory workers.

18. The defendant, pursuant to the plan and conspiracy hereinbefore stated, and as a part thereof and in order to carry it out, determined to restrain, suppress and destroy the competition of the plaintiff and of all other manufacturers of radio receiving set tubes and of all dealers therein in interstate and foreign commerce, and to do this by contract, combination and conspiracy and thereby to obtain a monopoly of this interstate and foreign commerce.

19. Pursuant to this conspiracy, and as one of the means of putting it into effect, the defendant required all persons, firms and corporations in order to obtain the right to use certain radio receiving set devices on which the defendant held Letters Patent, in the manufacture and sale of radio receiving sets and which were necessary therefor, to enter into the form of contract with the defendant hereinafter set forth.

20. The defendant put this step in this conspiracy into effect in the summer of 1927.

21. The defendant did not at this time hold any Letters Patent entitling it to any monopoly in radio tubes and has not since acquired any such patents.

22. In putting this step in this conspiracy into effect, the defendant combined and conspired with the holders of [fol. 8] other patents covering necessary devices other than tubes for the manufacture of radio frequency receivers, to issue a standard form of license agreement to manufacturers of radio sets purporting to give to the licensee a non-exclusive license to manufacture at its factory at a particular location and to sell radio apparatus for defined purposes under the Letters Patent owned by the licensors with certain stated exceptions.

23. This form of license contained a provision as follows:

9. Nothing herein contained shall be construed as conveying any licenses expressly or by implication, estoppel or otherwise to manufacture, use or sell vacuum tubes, except to use and sell the vacuum tubes purchased from the Radio Corporation as provided herein. The Radio Corporation hereby agrees to sell to the Licensee and the Licensee hereby agrees to purchase from the Radio Cor-

poration the number, and only the number, of vacuum tubes to be used as parts of the circuits licensed hereunder and required to make initially operative the apparatus licensed under this Agreement, such tubes to be sold by the Radio Corporation to the Licensee at the terms and at the prices at which they are then being sold by the Radio Corporation to other manufacturers of radio sets buying in like quantities for the same purpose. But the sale of such tubes by the Radio Corporation to the Licensee shall not be construed as granting any licenses except the right to sell such tubes for use in, and to use them in, the apparatus made and sold hereunder.

24. The state of the industry at this time was such, and the habits of the purchasing public were such, that this clause in its effect gave the defendant an illegal monopoly of the interstate and foreign commerce in tubes for radio receiving sets throughout the United States, because of the facts hereinbefore and hereinafter stated.

25. Radio set manufacturers could not manufacture radio receiving sets of the standard required by the purchasing public without incorporating into such sets devices other than tubes described in Letters Patent owned or controlled by the defendant.

[fol. 9] 26. This patent control by the defendant, and the apparent requirements of said clause 9, were known both to manufacturers and to dealers in radio receiving sets throughout the United States.

27. The great majority in volume of manufacturers and dealers in radio receiving sets throughout the United States did not dare to manufacture or to handle radio receiving sets of the standard required by the buying public in defiance of the provisions of these patents, without license from the defendant, and without compliance with the apparent requirements of said clause 9.

28. As a result of this, by these means the defendant completed and carried out its said plan and conspiracy and thereby restrained, suppressed and destroyed the existing competition in the manufacture of and interstate and foreign commerce in receiving set tubes.

29. The set manufacturers, to avoid the danger of unfounded suits by the defendant, and for no other reason, ceased to purchase tubes from the plaintiff and other manufacturers for initial installation in the sets manufactured by them.

30. For the same reason and no other, experimentalists in radio receiving set manufacture and in tubes therefor ceased to purchase tubes from the plaintiff and other tube manufacturers because of the belief which the defendant had created that such experimentation was useless because the commercial field for such tubes and sets equipped with them had been destroyed by the defendant.

31. The interstate and foreign commerce in replacement business in tubes was destroyed because it was the practice of radio receiving set purchasers to seek, as replacements of worn out tubes, tubes of the same kind as those supplied for the initial installation. The actual conditions in the industry and in the interstate and foreign commerce were such that a licensee would not under such circumstances invite litigation when immunity therefrom might be had by equipping every receiving set made by him, whether believed to be within the scope of the patents of the licensor or not, with the tubes of the defendant.

32. During the year 1927 as a part of the conspiracy aforesaid, and as a step in carrying it out, the defendant issued about twenty-five licenses as above described, all [fol. 10] containing the illegal clause aforesaid. These were all accepted and executed by the licensees and thereby the defendant, pursuant to and as a part of its plan and conspiracy as aforesaid, made contracts with the licensees and engaged in combinations and conspiracies with them in restraint of interstate and foreign commerce among the several states and with foreign nations, and combined and conspired with them to monopolize the commerce among the several states and with foreign nations in radio receiving set tubes, and attempted to monopolize said interstate and foreign commerce and did monopolize the same and made leases, licenses and sales and contracts for commodities for use, consumption or resale within the United States on the condition, agreement or understanding that the licensee, lessee or purchaser thereof shall not use or deal in the

radio receiving set tubes of competitors of the defendant where the effect of such lease, sale and contract for sale and such condition, agreement and understanding was tended to create a monopoly in said interstate and foreign commerce.

33. At all of said times the defendant had a place of business in the District of Massachusetts and conducted business therein and made some of said licenses therein, and the liability to the plaintiff resulting from the illegal acts aforesaid arose and has ever since remained outstanding against the defendant in the Commonwealth of Massachusetts.

34. The effect of the aforesaid illegal plan and conspiracy, and of the aforesaid illegal conduct of the defendant in carrying it out, upon the interstate and foreign commerce in tubes as aforesaid and upon that commerce of the plaintiff's was gradual during the latter part of the year 1927. By the end of 1927 said plan and conspiracy and said conduct in carrying it out had completely destroyed the profitable interstate and foreign commerce of the plaintiff and thereby, by the early part of 1928, the said tube business of the plaintiff and the property good will of the plaintiff therein had been totally destroyed at a time when it then had a present value in excess of three million dollars and thereby the plaintiff was then injured in its business and property in a sum in excess of three million dollars.

[fol. 11] 35. Wholly because of this destruction and of the illegal duress aforesaid which the defendant had imposed as aforesaid on this industry and this interstate and foreign commerce, the plaintiff and its Delaware corporation were compelled to seek and accept a license from the defendant.

36. With knowledge of this compulsion and relying on its effectiveness, the defendant exercised its illegally acquired power as aforesaid to compel the plaintiff and its said Delaware corporation to execute a purported release of claims against the defendant.

37. The illegal duress aforesaid by the defendant rendered said release void and the plaintiff has never executed a valid release of said claim.

38. When the Raytheon Manufacturing Company was organized in 1928 under the laws of Delaware, in order to avoid any doubt as to the assignability of the claim against the defendant an understanding was reached that the claim should be, as between the two corporations, in beneficial interest the property of the Delaware corporation and that it should be prosecuted for the benefit of the Delaware corporation by the plaintiff.

39. At the time of the execution of the void release aforesaid the defendant agreed with the plaintiff on or about March 19, 1929, that notwithstanding the general release to the defendant, that if hereafter any claimant for damages alleged to have arisen in the operation of a certain clause designated 9 in certain license agreements and g in certain other license agreements heretofore made by the licensors with manufacturers of radio receiving apparatus (said clause 9 having been the subject of injunction in the District Court of the United States for the District of Delaware) becoming licensed under all or a substantial part of the patents under which a license is granted by said agreement, shall obtain a pecuniary recognition of its claim in consequence of judgment or agreement of settlement or otherwise, then the licensee shall become entitled to assert its claim for such damages and none of the licensors shall be entitled to plead said releases in bar thereof but shall not be prejudiced hereby in the making of any other defenses which they or any of them now have to such claim; [fol. 12] and if the licensee shall be successful in obtaining recognition of its claim for such damages it shall not be entitled in any event to a total amount greater than the largest amount obtained by any other claimant and shall only be entitled to the payment thereof by crediting the same against the royalties payable under said agreement.

40. The illegal duress aforesaid rendered said limit on the amount of recovery, and the method of its payment, void.

41. In September or October, 1931, the defendant made pecuniary recognition to the extent of not less than $1,500,000 and remission of past royalties in addition to a claimant which was a group of manufacturers of radio receiving set apparatus becoming licensed by the defendant under

all or a substantial part of the patents under which a license was granted by the agreement aforesaid, which pecuniary recognition was of its claim in consequence of judgment or agreement of settlement or otherwise.

42. The injury done to this claimant by the acts of the defendant as aforesaid was much less in amount than the injury done to the plaintiff.

43. By reason of the facts aforesaid, even if the limitation imposed on recovery by said agreement were valid, the plaintiff is entitled to recover not less than $1,500,000 and the amounts of remissions of royalties as aforesaid.

44. The plaintiff by reason of the facts hereinbefore alleged hereby claims and is entitled to recover not less than $3,000,000 threefolded to not less than $9,000,000 and the costs of this suit, including a reasonable attorney's fee.

By its Attorneys, Nutter, McClennen & Fish, Edward F. McClennen, E. Curtiss Mower, Jr.

[fol. 13] IN UNITED STATES DISTRICT COURT

DISCLAIMER—Filed March 5, 1932

Now the plaintiff Raytheon Manufacturing Company organized in Massachusetts and now named by change of name Raytheon, Incorporated, and Raytheon Manufacturing Company organized in Delaware, say that the defendant has objected that this action is brought to recover on claims of said two corporations. Said two corporations deny that said objection has any foundation, but nevertheless to avoid any uncertainty said Massachusetts corporation and said Delaware corporation do hereby disclaim any right to recover in this action except on that only one cause of action arising under Title 15, chapter 1, section 15, of the Code of Laws of the United States which is alleged in the declaration, which said cause of action arose to said Massachusetts corporation and wholly existed before May 28, 1928, and before the organization of said Delaware corporation and which said cause of action did on or about May 28, 1928, by understanding and agreement between said two corporations become the property of said Delaware corporation for whose benefit this action is brought

by and in the name of said Massachusetts corporation at the instance and expense of said Delaware corporation, and the judgment on which is and shall be the property of said Delaware corporation. Any cause of action against the defendant which newly may have arisen directly to said Delaware corporation since its organization on or about May 28, 1928, wholly by reason of wrongs since said date and not derived from said Massachusetts corporation, is not included in this action but is disclaimed in this action.

Raytheon, Incorporated, Plaintiff, by Laurence Allan Hall, its Treasurer, David I. Sewall, its Assistant Treasurer, E. Curtiss Mower, Jr., its Attorney.

Raytheon Manufacturing Company (of Delaware), by Laurence Allan Hall, its President, David I. Sewall, its Treasurer, E. Curtiss Mower, Jr., its Attorney.

[fol. 14] IN UNITED STATES DISTRICT COURT

SECOND COUNT OF PLAINTIFF'S DECLARATION—Filed March 22, 1932

1. The plaintiff, Raytheon Manufacturing Company, is a corporation duly organized under the laws of the Commonwealth of Massachusetts in 1922 under the name American Appliance Company, subsequently changed to Ratheon Manufacturing Company, and subsequently changed to Raytheon, Inc., and a citizen, resident and inhabitant of the Commonwealth of Massachusetts having its usual place of business at Cambridge in said Commonwealth, and incorporated also in 1928 under the laws of the State of Delaware, for the benefit of which said corporation this action is brought.

2. The defendant, Radio Corporation of America, is a corporation duly organized under the laws of the State of Delaware and is a citizen of that State and was continuously at all times hereinafter stated and now is found in the District of Massachusetts, and continuously at said times had and now has an agent therein, and at all said times continuously has transacted and now transacts business therein.

3. The plaintiff for the benefit of said Raytheon Manufacturing Company organized under the laws of the State

of Delaware brings this action to recover the sum of exceeding nine million (9,000,000) dollars as threefold damages and for the cost of suit, including a reasonable attorney's fee, for the matters and things hereinafter set forth.

4. The plaintiff has been injured in its business and property by reason of the things done by the defendant, hereinafter set forth, forbidden in the Anti-Trust Laws of the United States whereby the plaintiff has suffered damages in its business and property in a sum in excess of three million (3,000,000) dollars which the plaintiff claims to recover three fold under Title 15, chapter 1, section 15, of the Code of Laws of the United States.

5. The defendant has made contracts and engaged in a combination and conspiracy in restraint of trade and commerce among the several states and thereby has attempted [fol. 15] to monopolize and has monopolized and has combined and conspired with others to monopolize trade and commerce among the several states and when so engaged in said commerce and as a part of said conspiracy and in carrying the said conspiracy out has, in the course thereof, made leases and contracts on the condition, agreement and understanding that the lessee or licensee shall not use or deal in the goods of competitors of the defendant and where the effect of such lease and contract and agreement and understanding was substantially to lessen competition and to tend to create a monopoly in a line of commerce in violation of Title 15, chapter 1, section 14, of the Code of Laws of the United States in the respects hereinafter set forth and solely by the illegal conjunction of said acts has injured the plaintiff in its business and property in the manner and to the extent hereinafter set forth.

6. The plaintiff in the year 1926 was engaged in the manufacture, distribution in interstate commerce and sale in interstate commerce, of tubes known as Raytheon rectifying tubes for use with radio receiving sets. The plaintiff had developed this tube through periods of prior experimentation and had expended large sums of money therein and in introducing this tube into use in interstate commerce by manufacturers of radio receiving sets and by dealers in such sets and had created and then possessed a large and valuable good will in this interstate commerce and then

had a large and profitable established interstate business therein, so that for the year 1926 the net profits of said business actually realized and received were $454,935. Said business then had an established prospect of large increase, and said business and the good will thereof was of a present value of exceeding three million dollars.

7. Prior to the year 1926 the defendant was engaged in interstate and foreign commerce in divers kinds of radio apparatus and in radio communication. When so engaged the defendant formed the plan and conspired to suppress, restrict and destroy all competition of others in this branch of interstate and foreign commerce and to monopolize that commerce. A large number of other concerns were at this time engaged in this branch of interstate and foreign com- [fol. 16] merce in competition with the defendant and there was then an established prospect of a substantial expansion of this interstate and foreign competition.

8. At this time there were many devices either necessary or desirable for the successful operation of radio receiving apparatus which were the subject of Letters Patent of the United States, owned by independent individuals, firms and corporations, and these were independent sources of supply for radio apparatus dealers and manufacturers who could obtain by negotiation with these independent competitors the patented articles and leases and licenses under the patents to manufacture and sell and use such articles.

9. For the purpose aforesaid and pursuant to the plan and conspiracy aforesaid the defendant conspired with several of these independent owners of Letters Patent, and of devices for radio receiving apparatus, to acquire as many as possible of these patents or exclusive licenses thereunder. Many of these patents were for competitive devices. Some of these licenses were absolutely exclusive, and others were exclusive with limited exceptions which would not interfere in actual conduct of business with the defendant's monopoly.

10. The defendant carried out this conspiracy and obtained this monopoly in the manner planned, and so completely that by the year 1927 it was practically impossible for manufacturers or dealers in commercially vendable radio receiving sets of the standard demanded by the purchasing public to manufacture or to sell such a set without

the consent of the defendant with respect both to devices for which the defendant held the patent and to devices for which the defendant held no patent.

11. The defendant has full knowledge of the various conveyances, agreements, leases, licenses, understandings and methods whereby the defendant has accomplished this monoply, and the plaintiff has not first-hand knowledge of any of them, but has reliable information as to many of them. The plaintiff abstains from setting them forth in [fol. 17] this declaration, because such allegations would involve the names of other persons, firms and corporations not parties to this suit.

12. By the year 1927 the defendant had so far perfected this unlawful monopoly in interstate commerce in radio receiving set apparatus that wholly by reason thereof it exerted by its illegal acts an illegal duress upon all those engaged in this branch of interstate commerce so that they were compelled involuntarily to deal with the defendant upon such terms as the defendant dictated or to cease business.

13. In the progress of this industry up to the beginning of the year 1927, it was the regular course of business for manufacturers of radio receiving sets to manufacture them and to sell them to jobbers and to dealers without tubes and for the jobbers or the dealers to procure tubes in the open market with which to equip them on or after the retail sale of them.

14. Radio receiving sets in ordinary course outlast the tubes first supplied with them. There is a recurring business in the supply of tubes to take the place of those worn out in use. It is the ordinary course of this business that the owner of a radio receiving set seeks replacement tubes of the same kind as those supplied with the set originally. As a result of this, control of the kind of tubes originally installed in the set or initially supplied for its use is in practice a control of the entire replacement business.

15. At the beginning of the year 1927 the defendant had no legitimate control over the trade and commerce either intrastate, interstate, or foreign, in radio receiving set tubes; but it was competing in the interstate and foreign commerce for the radio tube business and was in competi-

tion in that interstate and foreign commerce with the plaintiff.

16. By the beginning of 1927 the plaintiff had produced in the Raytheon rectifying tube the best rectifying tube for a radio receiving set that has been manufactured up to the present time.

17. By the beginning of 1927 the plaintiff was doing approximately eighty-five percent of the business in rectifier tubes of the entire United States. The plaintiff was selling and shipping these tubes in interstate commerce throughout the United States. [fol. 18] The plaintiff had a large interstate trade with radio set manufacturers, jobbers, dealers and laboratory workers.

18. The defendant pursuant to the plan and conspiracy hereinbefore stated, and as a part thereof and in order to carry it out, determined to restrain, suppress and destroy the competition of the plaintiff and of all other manufacturers of radio receiving set tubes and of all dealers therein, in interstate and foreign commerce, and to do this by contract, combination and conspiracy and thereby to obtain a monopoly of this interstate and foreign commerce.

19. Pursuant to this conspiracy and as one of the means of putting it into effect, the defendant required all persons, firms and corporations, in order to obtain the right to use certain radio receiving set devices on which the defendant held Letters Patent, in the manufacture and sale of radio receiving sets and which were necessary therefor, to enter into the form of contract with the defendant hereinafter set forth.

20. The defendant put this step in this conspiracy into effect in the summer of 1927.

21. The defendant did not at this time hold any Letters Patent entitling it to any monopoly in radio tubes and has not since acquired any such patents.

22. In putting this step in this conspiracy into effect, the defendant combined and conspired with the holders of other patents covering necessary devices other than tubes for the manufacture of radio frequency receivers, to issue a standard form of license agreement to manufacturers of radio

sets purporting to give to the licensee a non-exclusive license to manufacture at its factory at a particular location and to sell radio apparatus for defined purposes under the Letters Patent owned by the licensors with certain stated exceptions.

23. This form of license contained a provision as follows:

9. Nothing herein contained shall be construed as conveying any licenses expressly or by implication, estoppel or [fol. 19] otherwise to manufacture, use or sell vacuum tubes, except to use and sell the vacuum tubes purchased from the Radio Corporation as provided herein. The Radio Corporation hereby agrees to sell to the licensee and the licensee hereby agrees to purchase from the Radio Corporation the number, and only the number, of vacuum tubes to be used as parts of the circuits licensed hereunder and required to make initially operative the apparatus licensed under this agreement, such tubes to be sold by the Radio Corporation to the licensee at the terms and at the prices at which they are then being sold by the Radio Corporation to other manufacturers of radio sets buying in like quantities for the same purposes. But the sale of such tubes by the Radio Corporation to the licensee shall not be construed as granting any licenses except the right to sell such tubes for use in, and to use them in, the apparatus made and sold hereunder.

24. The state of the industry at this time was such, and the habits of the purchasing public were such, that this clause in its effect gave the defendant an illegal monopoly of the interstate and foreign commerce in tubes for radio receiving sets throughout the United States, because of the facts hereinbefore and hereinafter stated.

25. Radio set manufacturers could not manufacture radio receiving sets of the standard required by the purchasing public without incorporating into such sets, devices other than tubes described in Letters Patent owned or controlled by the defendant.

26. This patent control by the defendant and the apparent requirements of said clause 9 were known both to manufacturers and to dealers in radio receiving sets throughout the United States.

27. The great majority in volume of manufacturers and dealers in radio receiving sets throughout the United States did not dare to manufacture or to handle radio receiving sets of the standard required by the buying public in defiance of the provisions of these patents without license from the defendant and without compliance with the apparent requirements of said clause 9.

[fol. 20] 28. As a result of this, by these means the defendant completed and carried out its said plan and conspiracy and thereby restrained, suppressed and destroyed the existing competition in the manufacture of and interstate and foreign commerce in receiving set tubes.

29. The set manufacturers, to avoid the danger of unfounded suits by the defendant, and for no other reason, ceased to purchase tubes from the plaintiff and other manufacturers for initial installation in the sets manufactured by them.

30. For the same reason, and no other, experimentalists in radio receiving set manufacture and in tubes therefor ceased to purchase tubes from the plaintiff and other tube manufacturers because of the belief which the defendant had created that such experimentation was useless because the commercial field for such tubes and sets equipped with them had been destroyed by the defendant.

31. The interstate and foreign commerce in replacement business in tubes was destroyed because it was the practice of radio receiving set purchasers to seek, as replacements of worn-out tubes, tubes of the same kind as those supplied for the initial installation. The actual conditions in the industry and in the interstate and foreign commerce were such that a licensee would not under such circumstances invite litigation when immunity therefrom might be had by equipping every receiving set made by him, whether believed to be within the scope of the patents of the licensor or not, with the tubes of the defendant.

32. During the year 1927, as a part of the conspiracy aforesaid and as a step in carrying it out, the defendant issued about twenty-five licenses as above described, all containing the illegal clause aforesaid. These were all accepted and executed by the licensees and thereby the defendant, pursuant to and as a part of its plan and conspir-

acy as aforesaid, made contracts with the licensees and engaged in combinations and conspiracies with them in restraint of interstate and foreign commerce among the several States and with foreign nations, and combined and conspired with them to monopolize the commerce among [fol. 21] the several States and with foreign nations in radio receiving set tubes and attempted to monopolize said interstate and foreign commerce and did monopolize the same and made leases, licenses and sales and contracts for commodities for use, consumption or resale within the United States on the condition, agreement or understanding that the licensee, lessee or purchaser thereof shall not use or deal in the radio receiving set tubes of competitors of the defendant where the effect of such lease, sale and contract for sale and such condition, agreement and understanding was substantially to lessen competition and tended to create a monopoly in said interstate and foreign commerce.

33. At all of said times the defendant had a place of business in the District of Massachusetts and conducted business therein and made some of said licenses therein, and the liability to the plaintiff resulting from the illegal acts aforesaid arose and has ever since remained outstanding against the defendant in the Commonwealth of Massachusetts.

34. The effect of the aforesaid illegal plan and conspiracy, and of the aforesaid illegal conduct of the defendant in carrying it out, upon the interstate and foreign commerce in tubes as aforesaid and upon that commerce of the plaintiffs, was gradual during the latter part of the year 1927. By the end of 1927 said plan and conspiracy and said conduct in carrying it out had completely destroyed the profitable interstate and foreign commerce of the plaintiff and thereby, by the early part of 1928, the said tube business of the plaintiff and the property good will of the plaintiff therein had been totally destroyed at a time when it then had a present value in excess of three million dollars and thereby the plaintiff was then injured in its business and property in a sum in excess of three million dollars.

35. Wholly because of this destruction and of the illegal duress aforesaid which the defendant had imposed as aforesaid on this industry and this interstate and foreign com-

merce, the plaintiff and its Delaware corporation were compelled to seek and accept a license from the defendant.

36. With knowledge of this compulsion and relying on its [fol. 22] effectiveness, the defendant exercised its illegally acquired power as aforesaid to compel the plaintiff and its said Delaware corporation to execute a purported release of claims against the defendant.

37. The illegal duress aforesaid by the defendant rendered said release void and the plaintiff has never executed a valid release of said claim.

38. When the Raytheon Manufacturing Company was organized in 1928 under the laws of Delaware, in order to avoid any doubt as to the assignability of the claim against the defendant an understanding was reached that the claim should be as between the two corporations, in beneficial interest the property of the Delaware corporation and that it should be prosecuted for the benefit of the Delaware corporation by the plaintiff.

39. At the time of the execution of the void release aforesaid the defendant agreed with the plaintiff on or about March 19, 1929, that notwithstanding the general release to the defendant, that if, hereafter any claimant for damages alleged to have arisen in the operation of a certain clause designated "9" in certain license agreements and "g" in certain other license agreements heretofore made by the licensors with manufacturers of radio receiving apparatus (said clause "9" having been the subject of injunction in the District Court of the United States for the District of Delaware) becoming licensed under all or a substantial part of the patents under which a license is granted by said agreement, shall obtain a pecuniary recognition of its claim in consequence of judgment, or agreement of settlement, or otherwise, then the licensee shall become entitled to assert its claim for such damages and none of the licensors shall be entitled to plead said releases in bar thereof but shall not be prejudiced hereby in the making of any other defenses which they or any of them now have to such claim; and if the licensee shall be successful in obtaining recognition of its claim for such damages it shall not be entitled in any event to a total amount greater than the largest amount obtained by any other

claimant and shall only be entitled to the payment thereof by crediting the same against the royalties payable under said agreement.

[fol. 23] 40. The illegal duress aforesaid rendered said limit on the amount of recovery and the method of its payment void.

41. In September or October, 1931, the defendant made pecuniary recognition to the extent of not less than $1,600,000, and remission of past royalties in addition, to a claimant which was a group of manufacturers of radio receiving set apparatus becoming licensed by the defendant under all or a substantial part of the patents under which a license was granted by the agreement aforesaid, which pecuniary recognition was of its claim in consequence of judgment or agreement of settlement or otherwise.

42. The injury done to this claimant by the acts of the defendant as aforesaid was much less in amount than the injury done to the plaintiff.

43. By reason of the facts aforesaid, even if the limitation imposed on recovery by said agreement were valid, the plaintiff is entitled to recover not less than $1,600,000 and the amounts of remissions of royalties as aforesaid.

44. The plaintiff makes a part of this count the disclaimer filed in this court on or about March 5, 1932. The plaintiff disclaims to recover under this count any sum of money which the plaintiff recovers under the original count of this declaration filed in this case on December 14, 1931.

45. The plaintiff by reason of the facts hereinbefore alleged and the violation thereby of Title 15, chapter 1, section 14, of the Code of Laws of the United States, hereby claims and is entitled to recover not less than three million (3,000,000) dollars three-folded to not less than nine million (9,000,000) dollars and the costs of this suit including a reasonable attorney's fee.

By its Attorneys, Nutter, McClennen & Fish, Edward F. McClennen, E. Curtiss Mower, Jr.

Upon the filing of the writ and declaration herein, an order to plead was entered.

[fol. 24] IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION TO STRIKE OUT CERTAIN ALLEGATIONS IN THE WRIT AND DECLARATION—Filed January 30, 1932

The defendant in the above-entitled action moves that all allegations contained in the plaintiff's writ and declaration relating to Raytheon Manufacturing Company, a Delaware corporation, be stricken therefrom as immaterial and impertinent, said allegations being more particularly described as follows:

In the writ the allegation reading:

"Incorporated also under the laws of the State of Delaware for the benefit also of which said corporation this action is brought;"

In the declaration the allegation in paragraph 1 reading:

"Incorporated also in 1928 under the laws of the State of Delaware for the benefit also of which said corporation this action is brought;"

The allegation in paragraph 3 reading:

"For itself and for the benefit of said Raytheon Manufacturing Company organized under the State of Delaware."

The allegation in paragraph 35 reading:

"And its Delaware corporation."

The allegation in paragraph 36 reading:

"And its said Delaware corporation."

All allegations contained in paragraph 38.

By its Attorneys, John L. Hall, Choate, Hall & Stewart.

[fol. 25] IN UNITED STATES DISTRICT COURT

DEMURRER—Filed January 30, 1932

Now comes the defendant in the above-entitled action and demurs to the plaintiff's declaration therein and for causes of demurrer shows:

1. The declaration does not state concisely and with substantial certainty the substantive facts necessary to constitute the cause of action.

2. The plaintiff, Raytheon, Inc., a Massachusetts corporation, purports to bring said action in its own interest and behalf and also for the benefit of and as representative for Raytheon Maunfacturing Company, a Delaware corporation, and thereby the plaintiff joins an action in its own right with one in a representative capacity in the one declaration.

3. It appears from the said declaration that the true name of the plaintiff is Raytheon, Inc., whereas the action is prosecuted by the plaintiff under the name of Raytheon Manufacturing Company which is not the true name of the plaintiff.

4. It appears from the said declaration and particularly from paragraph 5 thereof that the plaintiff alleges as its cause of action acts alleged to violate the provisions of Title 15, chapter 1, sections 1, 2 and 14, of the Code of Laws of the United States and acts alleged to be illegal by reason of the provisions of said sections 1 and 2 cannot be combined in a single count with acts alleged to be illegal by reason of said section 14.

5. The several allegations contained in the declaration and hereinafter listed and set forth do not state a cause of action against the defendant and are wholly immaterial, irrelevant and impertinent to the cause of action which the remaining allegations of the declaration purport to state. Said immaterial, irrelevant and impertinent allegations are as follows:

In paragraph 5 the words (lines 1-6):

"has made contracts and engaged in a combination and conspiracy in restraint of trade and commerce among the several states and thereby has attempted to monopolize [fol. 26] and has combined and conspired with others to monopolize trade and commerce among the several states, and"

And the words (lines 6-7):

"and as a part of said conspiracy and in carrying the said conspiracy out."

And the words (line 14):

"Sections 1 and 2 and"

And the words (line 16):

"the illegal conjunction of".

In paragraph 7 the words (lines 3-11):

"When so engaged the defendant formed the plan and conspired to suppress, restrict and destroy all competition of others in this branch of interstate and foreign commerce and to monopolize that commerce. A large number of other concerns were at this time engaged in this branch of interstate and foreign commerce in competition with the defendant and there was then an established prospect of a substantial expansion of this interstate and foreign competition."

All allegations contained in paragraphs 8, 9, 10, 11 and 12.

All allegations contained in paragraph 16.

All allegations contained in paragraph 18.

In paragraph 19 the words (lines 1-2):

"Pursuant to this conspiracy and as one of the means of putting it into effect".

In paragraph 20 the words (line 1):

"In this conspiracy."

In paragraph 22 the words (line 1):

"in this conspiracy".

And the words (lines 2-5):

"combined and conspired with the holders of other patents covering necessary devices other than tubes for the manufacture of radio frequency receivers".

[fol. 27] In paragraph 24 the words (lines 5-6):

"because of the facts hereinbefore and hereinafter stated".

In paragraph 28 the words (lines 1-2):

"completed and carried out its said plan and conspiracy and".

In paragraph 32 the words (lines 1-2):

"As a part of the conspiracy aforesaid and as a step in carrying it out".

And the words (lines 5-13):

"pursuant to and as a part of its plan and conspiracy as aforesaid made contracts with the licensees and engaged in combinations and conspiracies with them in restraint of interstate and foreign commerce among the several states and with foreign nations, and combined and conspired with them to monopolize the commerce among the several states and with foreign nations in radio receiving set tubes, and attempted to monopolize said interstate and foreign commerce and did monopolize the same and".

In paragraph 34 the words (lines 1-2):

"the aforesaid illegal plan and conspiracy and of"

And the words (lines 2-3):

"In carrying it out."

And the words (lines 5-6):

"said plan and conspiracy and"

And the words (line 7):

"In carrying it out."

6. The several allegations contained in the declaration and hereinafter listed and set forth are wholly immaterial, irrelevant and impertinent:

In paragraph 1 the words:

"Incorporated also in 1928 under the laws of the State of Delaware for the benefit also of which said corporation this action is brought."

[fol. 28] In paragraph 3 the words:

"For itself and for the benefit of said Raytheon Manufacturing Company organized under the State of Delaware."

In paragraph 35 the words:

"And its Delaware corporation."

In paragraph 36 the words:

"And its said Delaware corporation."

All allegations contained in paragraph 38.

By its Attorneys, John L. Hall, Choate, Hall & Stewart.

I, John L. Hall, counsel for the defendant in the above-entitled action, hereby certify that this demurrer is filed in good faith, that there is such probable ground in law therefor as to make it a fit subject for judicial inquiry, and that it is not intended merely for delay.

John L. Hall.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES

Also at the same term, to wit, March 5, 1932, a disclaimer and motion to amend declaration was filed.

This cause was thence continued to the March Term, A. D. 1932, when, to wit, March 16, 1932, the aforementioned motion to amend declaration was allowed by consent, the Honorable Elisha H. Brewster, District Judge, sitting.

On the said sixteenth day of March, said cause came on to be heard on the motion to strike out certain allegations in the writ and declaration and on demurrer, the Honorable Elisha H. Brewster, District Judge, sitting.

Said cause was thence taken under advisement and on the eighteenth day of March, 1932, a memorandum of court was announced reserving decision until counsel have opportunity to consider the suggestion of the court as to amending the declaration.

At the same term, to wit, March 22, 1932, a motion to amend the declaration by adding a second count was filed and allowed and a second count to the declaration filed accordingly.

[fol. 29] Also on the twenty-second day of March, 1932, it was ordered by the court that the motion to strike out certain allegations in the writ and declaration be denied and the demurrer be overruled.

Also at the same term, to wit, April 11, 1932, an answer was filed. Said answer was subsequently amended on October 10, 1932, and allowed by the court on November 8, 1932.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWER AS AMENDED

[Filed April 11, 1932; Motion to Amend Filed October 10, 1932; Allowed November 8, 1932]

Now comes the defendant in the above-entitled action and for its answer denies each and every material allegation in the plaintiff's writ and declaration and both counts thereof contained.

And further answering the defendant says that after all the said alleged acts of the defendant set forth in said declaration and both counts thereof had taken place and all damage alleged to have arisen therefrom had accrued, to wit, on or about March 19, 1929, the plaintiff for a good and valuable consideration released the defendant from any and all claims, demands and/or causes of action which it then had or might have against the defendant;

The said release was under seal and was not executed under duress;

And further answering the defendant says that any cause of action mentioned in Count 2 of the said declaration did not accrue within three years before the commencement of this action and is barred by section 6 of chapter 146 of the Revised Statutes 1915 of the State of Delaware.

By its Attorneys, John L. Hall, Choate, Hall & Stewart.

[fol. 30] IN UNITED STATES DISTRICT COURT

MOTION TO TRANSFER CASE TO EQUITY FOR A PRELIMINARY HEARING UPON THE VALIDITY OF THE RELEASE GIVEN BY THE PLAINTIFF.—Filed October 10, 1932

Now comes the defendant in the above-entitled case and moves that the said case be transferred from the law side to the equity side of this Honorable Court for a preliminary hearing upon the issue of the validity of the release executed by the plaintiff upon the following grounds:

1. In its answer the defendant has alleged that the plaintiff released the defendant from all claims.

2. The plaintiff has conceded in paragraphs 36 and 37 of Counts 1 and 2 of its declaration that the plaintiff did execute such a release, but the plaintiff alleged that the said release was executed under duress.

3. The said release was under seal in that the plaintiff adopted the seals of the other parties who signed the release.

4. A release under seal cannot be avoided in an action at law.

5. Great delay and expense would be saved by a preliminary hearing on this issue.

By its Attorneys, Choate, Hall & Stewart.

On the said tenth day of October A. D. 1932, Defendant's Motion for Specifications was filed, items one and twenty-four being as follows:

IN UNITED STATES DISTRICT COURT

EXTRACTS FROM DEFENDANT'S MOTION FOR SPECIFICATIONS. —Filed October 10, 1932

Now comes the defendant in the above-entitled action and moves that the plaintiff be required to file a bill of particulars specifying the following matters and details:

1. State the character and type of the radio tubes alleged in paragraph 6 of Count 1 and in paragraph 6 of Count 2 of the declaration to have been manufactured, distributed and sold in interstate commerce by the plaintiff for use with radio receiving sets: (a) prior to the year [fol. 31] 1926; (b) during the year 1926; (c) during the year 1927 prior to March 1; (d) during the remainder of the year 1927; (e) throughout such subsequent period, if any, during which the plaintiff claims herein to have been damaged; (f) during the calendar year next ensuing after the expiration of the period mentioned in (e) above; and if manufactured under patent rights, the number or numbers of such patent or patents and the date or dates of issue of the same. Also deliver to the defendant with the particulars herein demanded three physical specimens of each type of tube so manufactured, distributed and sold by

the plaintiff, giving the dates when each such type was first placed on the market, and the dates when they were discontinued (if any of them have been discontinued).

* * * * * * *

24. State whether the understanding referred to in paragraph 38 of Count 1 and in paragraph 38 of Count 2 was oral or written, and if written, file with the particulars herein demanded a copy thereof.

* * * * * * *

By its Attorneys, Choate, Hall & Stewart.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES

At the same term, to wit, November 8, 1932, it was ordered by the court, the Honorable James A. Lowell, District Judge, sitting, that the motion to amend answer be allowed, no one appearing in opposition.

On the said eighth day of November, A. D. 1932, this cause was set down for hearing on the aforementioned defendant's motion for specifications, the Honorable James A. Lowell, District Judge, sitting, and it was ordered that the motion be allowed, except item No. 2 as to quarterly business, and that specifications be filed by January 5, 1933.

Also on the said eighth day of November, A. D. 1932, this cause was set down for hearing on the aforementioned motion to transfer case to equity, the Honorable James A. Lowell, District Judge, sitting, and it was ordered by the court that said motion be allowed.

On the ninth day of November, 1932, a plaintiff's bill of exceptions remotion for transfer was filed and allowed.

[fol. 32] On the eighth day of November, 1932, case No. 5021 Law Docket having been transferred to the above equity case No. 3767, the following Plaintiff's Motion for Framing Jury Issues was filed on the twelfth day of said November:

In United States District Court

No. 3767

Equity Docket

Raytheon Manufacturing Company, Plaintiff,

v.

Radio Corporation of America, Defendant

Plaintiff's Motion for Framing Jury Issues.—Filed November 12, 1932

Now comes the plaintiff in the above action, without waiving hereby its objections to the jurisdiction of this Honorable Court but expressly relying thereon, and moves that the court order the framing of an issue to be tried by a jury upon the issue of the validity of the release executed by the plaintiff.

The plaintiff suggests that it be framed as follows:

Was the release dated March 19, 1929 executed by the plaintiff under duress?

By its Attorneys, Edward F. McClennen, E. Curtiss Mower, Jr.

In United States District Court

Motion to Amend Defendant's Answer.—Filed and Allowed December 22, 1932

Now comes the defendant in the above-entitled cause and moves that its answer be amended by adding the following:

And further answering paragraphs 35 through 43 of Count I and of Count II of the plaintiff's declaration, the [fol. 33] defendant says that on March 19, 1929, the plaintiff executed a general release under seal to the defendant, that the said release constituted an integral part of the license granted by the defendant to the Raytheon Manufacturing Company set forth in paragraph 35 of the said declaration, that over two years elapsed since the execution of the said release and the said license before the

present suit was brought in December, 1931, that at no time since the execution of the said release and the said license and prior to bringing the present suit has the plaintiff asserted any claim that the said release was void or voidable for duress or for any other reason, that in reliance upon the plaintiff's acceptance of the said release and the said license, the defendant has granted certain rights under the said license, has forborne from suing the plaintiff for infringement, has accepted royalties under the said license and in many other respects has altered and changed its position; and the defendant says that the plaintiff has been guilty of laches and by reason of its said unreasonable delay and acquiescence, the plaintiff cannot now assert that the said release was void because of duress.

And for further answer to paragraphs 35 through 43 of Count I and Count II of the plaintiff's declaration, the defendant says that on March 19, 1929, the plaintiff executed a general release under seal to the defendant, that the said release constituted an integral part of the license granted by the defendant to Raytheon Manufacturing Company of Delaware set forth in paragraph 35 of Counts I and II of the plaintiff's declaration, that as a further integral part of the said license the said Delaware Company also executed a release under seal to the defendant, that over two years have elapsed since the execution of the said releases and of the said license prior to the bringing of this suit, that the plaintiff and the said Delaware Company ever since March 19, 1929, and up to the time this suit was brought in December, 1931, have voluntarily acquiesced in, confirmed and ratified the said license and the said releases, and paid royalties thereunder and have asserted their rights thereunder; that on December 14, 1931, the same day on which the present suit was brought, the said Raytheon Manufacturing Company of Delaware brought a bill in equity in the Su- [fol. 34] preme Court of the Commonwealth of Massachusetts, Equity No. 55069, to affirm the said license and to enjoin the defendant from terminating the said license, that the said bill in equity was referred to a Master, and that hearings were had before the said master and his report was confirmed by the Supreme Court of the said Commonwealth and an order was entered by the Supreme Court enjoining the defendant from terminating the said license so long as the said Delaware Company should pay the defend-

ant all royalties due thereunder; that it is alleged in the plaintiff's disclaimer that the present suit is brought for the sole benefit and at the instance and expense of the said Delaware Corporation; that whether or not the said license and the said releases were executed under duress as alleged, the plaintiff and the said Delaware Company have ratified and confirmed the said releases and the said license by their voluntary acquiescence, acts and payments of royalties, and cannot now be heard to assert that the said releases were executed under duress.

And for further answer to paragraphs 35 through 43 of Count I and Count II of the plaintiff's declaration, the defendant says that on March 19, 1929, the plaintiff executed a general release under seal to the defendant, that the said release constituted an integral part of a license granted by the defendant on the same day to the Raytheon Manufacturing Company of Delaware set forth in paragraph 35 of Counts I and II of the plaintiff's declaration, that as a further integral part of the said license the said Delaware Company also executed a release under seal to the defendant, that on December 14, 1931, the same day on which the present suit was brought, the said Raytheon Manufacturing Company of Delaware brought a bill in equity in the Supreme Court of the Commonwealth of Massachusetts, Equity No. 55069, to affirm the said license and to enjoin the defendant from terminating the said license, that the said bill in equity was referred to a master, and that hearings were had before the said master and his report was confirmed by the Supreme Court of the said Commonwealth and an order was entered by the Supreme Court enjoining the defendant from terminating the said license so long as [fol. 35] the said Delaware Company should pay the defendant all royalties due thereunder. The defendant, therefore, says that the said Delaware Company has finally elected to affirm the said license, that the said releases were and are an integral part of the said license, and that the said Delaware Company is barred from now asserting directly or indirectly that its said release is void by reason of duress, that it is alleged in the plaintiff's disclaimer that the present suit is brought for the sole benefit and at the instance and expense of the said Delaware Company and the said plaintiff is barred by the election of said Delaware

Company from asserting that its own said release was executed under duress.

By its Attorneys, Choate, Hall & Stewart.

December 22, 1932. Allowed.

E. H. B., D. J.

IN UNITED STATES DISTRICT COURT

EXTRACTS FROM PLAINTIFF'S BILL OF PARTICULARS—Filed January 16, 1933

Pursuant to the order of the court entered on November 8, 1932, the plaintiff files the following bill of particulars:

1. Plaintiff's rectifying tubes and patents.

With reference to the character and type of the radio tubes manufactured, distributed and sold by it in interstate commerce, the plaintiff specifies as follows:

(a) Prior to 1926 it manufactured, distributed and sold in interstate commerce type B rectifying tubes.

(b) During 1926 it manufactured, distributed and sold in interstate commerce types B and BH rectifying tubes.

(c) During 1927 prior to March 1, it manufactured, distributed and sold in interstate commerce types B and BH rectifying tubes.

[fol. 36] (d), (e) and (f) During the remainder of 1927 and throughout the period during which it claims to have been damaged and during the calendar year next ensuing after the expiration of that period, it or after May 29, 1928, its Delaware corporation, manufactured, distributed and sold in interstate commerce types B, BH and BA rectifying tubes.

The plaintiff further specifies that it manufactured, distributed and sold the foregoing types of rectifying tubes under its common law and patent rights, including the following Letters Patent of the United States:

Number of patent	Date of issue	
1,545,207,	July 7, 1925.	
1,617,171,	Feb. 8, 1927.	
1,617,172,	Feb. 8, 1927.	
1,617,174,	Feb. 8, 1927.	
1,617,177,	Feb. 8, 1927.	
1,617,178,	Feb. 8, 1927.	
1,617,179,	Feb. 8, 1927.	
1,617,180,	Feb. 8, 1927.	
1,617,181,	Feb. 8, 1927.	
1,679,449,	Aug. 7, 1928	(application June 13, 1927).
1,731,889,	Oct. 15, 1929	(application June 26, 1922).
1,738,169,	Dec. 3, 1929	(application May 8, 1923).
1,841,288,	Jan. 12, 1932	(application Nov. 29, 1924).
1,841,289,	Jan. 12, 1932	(application May 16, 1925).
1,880,814,	Sept. 27, 1932	(application April 14, 1925).
1,887,868,	Nov. 15, 1932	(application Nov. 3, 1925).

The plaintiff further specifies that it has not in its possession any physical specimens of any of the types of tubes so manufactured, distributed and sold by it during the periods hereinbefore referred to.

* * * * * * *

24. Understanding between plaintiff and its Delaware Corporation.

The plaintiff specifies that the understanding referred to [fol. 37] in paragraphs 38 of Counts 1 and 2 was at first oral. Later it was reduced to writing in the terms of the disclaimer now on file in the case.

By its Attorneys, Nutter, McClennen & Fish.

In United States District Court

Minute Entries

This cause was then continued to the March Term, A. D. 1933, when, to wit, April 4, 1933, said cause came on to be heard on the aforementioned plaintiff's motion for framing

jury issues, the Honorable James A. Lowell, District Judge, sitting, and it was ordered by the court that the motion be denied.

At the same term, to wit, April 6, 1933, a plaintiff's bill of exceptions re motion for framing jury issues was filed and allowed.

This cause was thence continued from term to term to the December Term, A. D. 1933, when, to wit, January 3, 1934, the following Plaintiff's Motion to Rescind, Vacate or Supersede the Order of November 8, 1932, Allowing Motion to Transfer to Equity was filed:

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION TO RESCIND OR TO VACATE OF TO SUPERSEDE THE ORDER OF NOVEMBER 8, 1932, ALLOWING MOTION TO TRANSFER TO EQUITY—Filed January 3, 1934

The plaintiff moves the court to rescind or to vacate or to supersede the order entered on the record of this case on or about November 8, 1932, whereby was allowed the defendant's "Motion to transfer case to equity for a preliminary hearing upon the validity of the release given by the plaintiff".

The plaintiff assigns for this motion to rescind or to vacate or to supersede the reasons following:

The motion to transfer was granted on the misapprehension of the court that the defendant alleged a release under seal valid at law and that the plaintiff claimed that this release was wholly void in equity or that the plaintiff had because of duress a right in equity to be relieved in equity from the operation of a release valid at law.

To remove any chance for doubt, the plaintiff hereby [fol. 38] disclaims any right or remedy in equity in this case, because of duress, to be relieved from such operation as said release would have at law had there been no duress.

Following this disclaimer, the issue, as to duress, for trial is whether the purported release which was obtained by the defendant from the plaintiff was originally obtained in fact by the duress of a power obtained by the defendant by unlawfully restraining interstate trade and substantially lessening competition therein by contract, combination or con-

spiracy or otherwise or by monopolizing or attempting to monopolize interstate trade in violation of Code of Laws of the United States, Title 15, chapter 1, sections 1, 2 and 14, or any of them, and if so whether a court of law not equity of the United States will adjudge originally valid a release so obtained, notwithstanding such duress.

A court of equity is without jurisdiction of these issues when presented in an action at law in which as to such duress neither party claims an equitable right or seeks an equitable remedy.

The plaintiff has and claims a right to trial by jury on this issue which arises in an action at law.

A decision by a judge without a jury on this issue of fact, whether sitting in equity or at law, rendered without the acquiescence of the plaintiff would not conclude the question or prevent its trial before a jury. Also, as there is under the contemporaneous agreement (declaration, par. 39), a limited right of recovery even if the release were valid, the establishment of its validity would not prevent a trial before the jury on the issues of monopolization and restraint of trade. These are the same issues which must be tried in order to determine the issue of duress. The decision of a judge without a jury will not shorten the trial before a jury, or be admissible as advisory to the jury or prevail over the jury, to whose decision the plaintiff is entitled.

The plaintiff appends hereto a supporting memorandum.

By its Attorneys, Edward F. McClennen, E. Curtiss Mower, Jr.

[fol. 39] *Duly sworn to by E. F. McClennen. Jurat omitted in printing.*

February 2, 1934. Motion denied.

E. H. B., D. J.

Counsel notified.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY

On the twenty-second day of January, A. D. 1934, said cause came on to be heard on the foregoing motion to rescind, vacate or supersede order of allowance to transfer

to equity, the Honorable Elisha H. Brewster, District Judge, sitting, and on the second day of February, 1934, it was ordered by the court that said motion to rescind, etc., be denied.

On the seventh day of February, A. D. 1934, a bill of exceptions to denial of motion to rescind was filed and allowed by the court.

IN UNITED STATES DISTRICT COURT

MOTION FOR ENTRY OF FINAL DECREE—Filed February 12, 1934

The plaintiff insists on its objection to the jurisdiction of this court in equity and to the order of transfer thereto and without waiving said objections says as follows:

1. The plaintiff hereby discontinues, becomes nonsuit and dismisses before any hearing in equity any and all allegations and claims that in equity the release alleged in the plaintiff's declaration and in the defendant's motion for transfer is invalid in equity more than at law and that the plaintiff has any equitable right to a decree declaring said release invalid, or to any relief in equity.

2. The plaintiff admits and avers that it has no right in [fol. 40] equity or to any remedy therein and because, and that, it has a plain, adequate and complete remedy at law in that a court of law will not give force or effect to a release obtained in the manner alleged and having said unlawful effect if enforced.

3. The plaintiff tenders in equity no evidence in support of any right to relief in equity and now has no such evidence and, therefore, before hearing, announces the conclusion of its evidence in equity in support of any such right in equity, to the same extent and with the same effect as if the court in equity should now have set this case for hearing of evidence against the plaintiff's protest.

4. This suit in equity is now before hearing ripe for final disposition.

Wherefore, the plaintiff moves that a final decree be entered in equity No. 3767, (1) dismissing said suit in equity No. 3767 for the reasons aforesaid, or (2) terminating said

suit in equity No. 3767 in such manner as, in this state of the record, equity requires and (3) thereupon returning the papers originally filed in Law No. 5021 to the court of law.

By its Attorneys, Edward F. McClennen, E. Curtiss Mower, Jr.

On the nineteenth day of said February, A. D. 1934, said cause comes on to be heard on the aforementioned motion for entry of final decree, the Honorable Elisha H. Brewster, District Judge, sitting.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—February 19, 1934

1. The present case was originally brought at law on December 14, 1931, under the Federal Anti-Trust Laws.

2. The defendant pleaded in defense a general release under seal.

3. The plaintiff by way of anticipatory replication in its [fol. 41] declaration alleged, first, that the said release was executed under duress and, second, that in any event the said release was qualified.

4. The defendant moved that the case should be transferred to equity for a preliminary hearing upon the issue of the validity of the release.

5. On November 8, 1932, Judge Lowell sitting at law ruled that the plaintiff could not attack the validity of the release at law for duress. Accordingly Judge Lowell granted the defendant's motion and transferred the case to equity for a preliminary hearing upon the issue of the validity of said release.

6. Subsequently, on January 3, 1934, the plaintiff disclaimed in open court any right or remedy in equity in this case, because of duress, to be relieved from such operation as said release would have at law had there been no duress.

7. By paragraph 3 of the plaintiff's present motion for final decree on February 12, 1934, the plaintiff states that

it tenders no evidence in support of any right to relief in equity and has no such evidence.

8. Upon the issue submitted aforesaid to the court sitting in equity, I, therefore, rule that the release is valid.

February 19, 1934.

E. H. B., D. J.

IN UNITED STATES DISTRICT COURT

FINAL DECREE—February 19, 1934

This case came on to be heard at this term upon the issue of the validity of the release executed by the plaintiff and was argued by counsel; and thereupon upon the plaintiff's motion of February 12, 1934, it was ordered, adjudged and decreed as follows:

1. The release set forth in the defendant's answer and the defendant's motion to transfer the case to equity and described in paragraphs 36 and 37 of each count of the plaintiff's declaration is valid and binding.

[fol. 42] 2. The case is accordingly transferred back to law for further proceedings in accordance with this decree.

By the Court.

Mary E. Pendergast, Deputy Clerk.

February 19, 1934.

E. H. B., D. J.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY

On the first day of March, A. D. 1934, a plaintiff's bill of exceptions re motion for entry of final decree is filed and allowed.

From the foregoing final decree, the plaintiff claimed an appeal to the United States Circuit Court of Appeals for the First Circuit on the ninth day of March, A. D. 1934, which appeal was allowed by the court on the same day.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S BILL OF EXCEPTIONS RE MOTION FOR TRANSFER—Filed and Allowed November 9, 1932.

Reference may be had to the pleadings and motion for transfer filed in this case on or about October 10, 1932.

This motion, that the said case be transferred from the law side to the equity side of this Honorable Court for a preliminary hearing upon the issue of the validity of the release executed by the plaintiff, was heard by the court on the pleadings and without the introduction of any evidence, except that the release referred to in the motion was introduced and inspected by the court on November 8, 1932. The plaintiff opposed the motion on the ground that the release was void by reason of duress and that therefore the court was without jurisdiction to grant it, and that if it had such jurisdiction it should not exercise it to grant the motion, and in support of both contentions claimed that the plaintiff was entitled to trial by jury on the question of the validity of the release. The court overruled the objections and granted the motion. The plaintiff duly excepted.

The plaintiff prays that its bill of exceptions be allowed.

By its Attorneys, Edward F. McClennen, E. Curtiss Mower, Jr.

[fol. 43] November 9, 1932. Allowed.

James A. Lowell, Judge of the United States District Court.

IN UNITED STATES DISTRICT COURT

MOTION TO AMEND BILL OF EXCEPTIONS—Filed and Allowed March 8, 1934

The plaintiff moves that its bill of exceptions allowed November 9, 1932, be amended by adding thereto the true copy, appended hereto marked "A" and "B", of the release inspected by the court as stated in said bill of exceptions.

Edward F. McClennen, Attorney for Plaintiff.

March 8, 1934. Allowed.

Elisha H. Brewster, District Judge.

A.

License agreement dated March 19, 1929, between Radio Corporation of America (hereinafter called the Radio Corporation), General Electric Company and Westinghouse Electric & Manufacturing Company (the Radio Corporation, General Electric Company and Westinghouse Electric & Manufacturing Company being hereinafter called Licensors), and Raytheon Manufacturing Co., a corporation of the State of Delaware, having an office at 238 Main Street, Cambridge, Mass. (hereinafter called Licensee).

Recitals

1. The Licensors represent that they severally own or have the right to grant licenses under various United States Letters Patent relating to, or useful in the manufacture of, Tubes as hereinafter in Section 1 of Article One hereof defined.

2. The Licensors, among other things, are engaged in developing inventions relating to Tubes and improved methods and systems of manufacturing the same.

3. The Licensors have heretofore instituted various suits against infringers of some or all of said United States Letters Patent.

[fol. 44] 4. The Licensee desires to obtain a release of all claims of the Licensors arising from infringements by the Licensee prior to the date hereof in the fields of the licenses herein expressed.

5. The Licensee desires to make lawful use of some or all of the inventions covered by said United States Letters Patent, and to that end desires to acquire the licenses herein expressed.

Now, therefore, in consideration of the promises, of the licenses granted herein by the Licensors to the Licensee and of the mutual covenants herein contained, it is agreed as follows:

Article One. Definitions

For the purposes of this Agreement, the following terms are defined as follows:

Section 1. "Tube" means a device consisting of an envelope which contains two or more electrodes, and which is

to any extent evacuated, or contains gas or vapor under any degree of pressure, and is capable of changing the form of controlling or modifying energy supplied thereto for the purpose of producing or reproducing sound or pictures.

Section 2. "Homes" means all places of residence, permanent or temporary, including, however, as to hotels, hospitals and club houses, only the private living room thereof.

Section 3. "Pictures" means light images, shadows, reflections and other visible reproductions of the aspect or shape of animate or inanimate objects, or of drawings, writings, forms, and other graphic, printed and written matter of all kinds.

Article Two. Licenses

Section 1. Each of the Licensors hereby grants to the Licensee, for the term of this agreement, under all of the United States Letters Patent relating to, or useful in the manufacture of, Tubes which during the term of this Agreement it may own or control or with respect to which it may have the right to grant licenses, but only upon the terms and conditions and for the uses hereinafter specified, a personal, indivisible, non-transferable and non-exclusive license to manufacture complete Tubes at the Licensee's factories located at Cambridge and Newton in the State of [fol. 45] Massachusetts, and not elsewhere without the written permission of the Radio Corporation, and to sell only in the United States, its territories and possessions, complete Tubes manufactured by the Licensee or by any of the other licensees of the Licensors.

Section 2. Tubes may be manufactured and sold under the licenses hereby granted only for use in the United States, its territories and possessions, in (a) radio broadcast reception (including, among other things, television) and (b) reproduction of sound and pictures from records, to be heard or seen in the immediate vicinity of the apparatus used in such reproduction (not including transmission to, or reception at, other points of such sound and pictures), and in each case only for private use in homes for entertainment and educational purposes.

Section 3. The licenses hereby granted do not include any license to sell any part of a Tube, as distinguished from the complete Tube, or any machine, appliance or material, or any part thereof.

Section 4. The Licensee may renew burned out Tubes manufactured by the Licensors or any of their licensees and sell such renewed Tubes, treating them as new Tubes, for all purposes of this Agreement, provided that all trademarks and names on the burned out Tubes (other than those of the Licensee) be completely obliterated and the word "renewed" be plainly and conspicuously etched on the glass of such renewed Tubes.

Section 5. The admission of validity implied in the acceptance of licenses hereunder is limited to the scope and field for which such licenses are granted or agreed to be granted.

Section 6. Nothing herein contained shall be construed as conferring upon the Licensee, either expressly or by implication, estoppel or otherwise, any license under any patents of countries other than the United States.

Section 7. The right of the Licensors, in respect of certain United States Letters Patent, to grant licenses hereunder, is derived from an Agreement dated July 1, 1926, between General Electric Company and American Telephone and Telegraph Company (hereinafter called the Telephone Company) with which the parties are familiar, and the [fol. 46] Telephone Company has assented to the execution of this Agreement by the Licensors on the condition, to which the Licensee agrees, that at any time during the term of this Agreement or any extension thereof, the Licensee will, upon request from the Telephone Company, grant to the Telephone Company, or to any corporation or corporations controlled by the Telephone Company, through ownership of more than fifty per cent (50%) of its issued stock, upon reasonable terms, at least as favorable as those granted to others, such licenses in respect to those United States Letters Patent which the Licensee may at that time own or control, as the Telephone Company may desire in the fields in which the Telephone Company received licenses under said Agreement dated July 1, 1926, continuing during the term of the said Letters Patent.

Section 8. The Licensee agrees, that at any time during the term of this Agreement or any extension thereof it will, upon request from any of the Licensors, grant to any of the Licensors or to any corporation or corporations con-

trolled by any one or more of them, through ownership of more than fifty per cent (50%) of its issued stock, upon reasonable terms, at least as favorable as those granted to others, such non-exclusive licenses in respect of those United States Letters Patent which the Licensee may at that time own or control, as any of the Licensors may desire, continuing during the term of the said Letters Patent.

Article Three. Royalties

Section 1. The Licensee shall pay royalty with respect to all Tubes sold by it, which embody or are made in accordance with or by the use of any invention of any unexpired patent now or hereafter issued under which a license is or may be required hereunder, as follows:

The Licensee shall pay to the Radio Corporation a royalty of ten per cent (10%) on the Licensee's invoice price (before cash discounts, freight or advertising allowances, or similar deductions) of the Tubes licensed under this Agreement and sold by it during the term of this Agreement.

[fol. 47] Section 2. The Licensee's invoice price (before cash discounts, freight or advertising allowances, or similar deductions) of Tubes, which have been consigned, less selling commissions to consignees shall be deemed to be the Licensee's sales price for the purpose of computing the royalties payable hereunder.

Section 3. In computing the amounts upon which the above-mentioned royalties are payable, credit may be taken by the Licensee for all amounts credited by the Licensee to its customers either as a result of price reductions established by the Licensee in respect of Tubes previously sold, or as a result of the return of Tubes by such customers to the Licensee.

Section 4. The Licensee shall report the sale of any Tubes, obtained (subject, however, to the provisions of Section 5 of Article Five hereof) from other licensees of the Licensors licensed to make and sell such Tubes and shall pay royalty thereon, in all respects as though they had been manufactured by the Licensee itself under this

Agreement. Sales of Tubes by the Licensee to other licensees of the Licensors shall be reported to the Licensors, but shall not be subject to payment by the Licensee of royalty thereon.

Section 5. In order to insure to the Radio Corporation the full royalty payments contemplated hereunder, the Licensee covenants that, in the event that any Tubes licensed hereunder shall be sold either (1) to a corporation, firm or association which, or individual who, shall own a controlling interest in the Licensee by stock ownership or otherwise, or (2) to a corporation, firm or asociation in which the Licensee of its stockholders shall own a controlling interest by stock ownership or otherwise, the royalties to be paid hereunder in respect of such Tubes shall be based upon the invoice price at which such purchaser resells said Tubes, rather than upon the invoice price of the Licensee.

Section 6. The Licensee agrees to pay to the Radio Corporation, in each calendar year during the term of this Agreement, royalties aggregating at least fifty thousand ($50,000) dollars.

Section 7. If the Licensors shall in the future grant another license for the same purposes and for the same [fol. 48] territory as provided herein, at a rate of royalty less than ten per cent. (10%) for future manufacture and sale, then the Licensee shall thereafter have the benefit of such lower rate of royalty, provided that the Licensee at the same time accepts all the other conditions and obligations imposed on the Licensee by such other license, and by any agreement referred to therein with any of the Licensors, and makes equal contributions to the Licensors. The Radio Corporation shall notify the Licensee upon the granting of such other license. This provision shall not apply to any agreement or agreements between any of the Licensors themselves or between the Licensors or any of them and the Telephone Company, or any of their respectively owned, controlled or associated corporations, present or futture.

Article Four. Reports and Payments

Section 1. The Licensee, within fifteen (15) days after, and as of, the first days of January, April, July and Octo-

ber in each year respectively during the term of this Agreement (hereinafter called "Quarter Days"), shall furnish the Radio Corporation with written statements, under oath, specifying the total number and invoice price thereof by types of Tubes sold under this Agreement by the Licensee in each month during the preceding quarter, or that part of the preceding quarter during which this Agreement shall have been in force and the totals thereof with respect to all such Tubes. A similar statement shall be rendered within fifteen (15) days after, and as of, the date of the termination of this Agreement covering the period from the last preceding Quarter Day to the date of the termination of this Agreement. The royalty prescribed in Section 1 of Article Three hereof shall be due and payable on the 30th days of January, April, July and October of each year respectively during the term of this Agreement, and on the 30th day following the date of the termination of this Agreement, upon all such Tubes sold by the Licensee during the respective periods covered by the statements above mentioned. Any amount required to bring the aggregate royalty payments for any calendar year, or part thereof that this Agreement shall be in force, up to the amount of the minimum royalties payable for such year, or part of [fol. 49] year, as in Section 6 of Article Three hereof provided, shall be due and payable on the 30th day of January next following such calendar year, or part of year, or, as the case may be, on the 30th day following the date of the termination of this Agreement.

Section 2. Tubes shall be deemed to be sold within the meaning of this Agreement when they have been billed to any vendee, consignee or user, or, if they are not billed, when they have been shipped, delivered, mailed or consigned to any vendee, consignee or user.

Section 3. The Licensee shall keep full, true and accurate written books of account and record of all business done under the licenses granted by this Agreement in sufficient detail to enable the Radio Corporation to ascertain what license fees or royalties are due hereunder. Said books and records shall particularly show the number by types of Tubes made and sold under the licenses granted by this Agreement, the name and address of the purchasers thereof, and the Licensee's invoice price thereof (before cash

discounts, freight or advertising allowances or similar deductions). Said books of account and records shall be open to the inspection of the Radio Corporation or their duly authorized representatives at all reasonable times, and generally the Licensee shall allow such investigation of the Licensee's business and operation in connection with this Agreement as may be necessary to determine the accuracy of the Licensee's accounts, records, reports and payments hereunder.

Article Five. Patent Marking and Trademarks

Section 1. The Licensee shall list on each Tube, or on the carton containing the same, the numbers of the patents which are, in the opinion of the Radio Corporation, involved in such Tubes.

Section 2. The Licensee shall affix to the base of all Tubes, manufactured and sold by the Licensee, which embody patented inventions under which licenses are granted herein, notices reading as follows:

"Licensed only to extent indicated on carton" and shall [fol. 50] inscribe on the cartons containing the same, a license notice reading as follows:

"License Notice. This device is licensed under patent claims of Radio Corporation of America on the device itself but only for use in radio broadcast reception and reproduction of sound and pictures from records, to be heard or seen in the immediate vicinity of the apparatus used in such reproduction (not including transmission to, or reception at, other points of such sound and pictures), and in each case only for private use in homes for educational and entertainment purposes. It is not licensed under patent claims on combinations of the device with other devices or elements, as for example in various circuits and hook-ups, except only for use in apparatus and systems already licensed for use under such patent claims on combinations."

Section 3. All markings and inscriptions provided for by Sections 1 and 2 of this Article Five, shall be of a prominent, fixed and permanent character, and displayed in such manner that dealers and wholesale and retail purchasers and users may see the same at the time of purchase and

sale, and the Licensee's circulars and catalogues referring to said Tubes shall also contain the same markings and inscription. The Licensee will also observe any reasonable requirements which the Radio Corporation, by notice in writing to the Licensee, may impose for the purpose of preventing the use of said Tubes otherwise than in accordance with the licenses hereby granted.

Section 4. The Licensee agrees that neither the name of any Licensor, nor any trademark or brand of any Licensor, nor the name or trademark or brand of any of their other licensees, nor simulation of any of these, shall be used in connection with the advertisement or sale of, or be placed upon any Tubes manufactured under this Agreement, and that it will not handle or deal in Tubes covered by any patents included herein which falsely appear or are falsely sold under any name or trademark, or simulation thereof, either of the Licensors or any of their licensees.

[fol. 51] Section 5. The Licensee agrees to mark on every Tube manufactured or sold by it under this license after April 1st, 1929, the word Raytheon and such other trademark or trademarks as the Licensee shall have given written notice to the Raido Corporation that it has adopted by etching, stamping, or in some other permanent form affixing to every such Tube and, after said date, no Tube shall be a licensed Tube unless it bears such mark or marks of the Licensee or of any of the other licensees of the Licensors.

Article Six. Settlement of Past Damages

Section 1. The Licensee admits that it is indebted to the Licensors to the amount of dollars ($), which sum has been determined and fixed as the amount due from the Licensee to the Licensors in full settlement of all claims for damages to the date hereof for and on account for (but on no other account all past infringement in the fields of the licenses herein granted by the Licensee of the Licensors' patents under which licenses are granted hereby by reason of the manufacturer, use and sale of Tubes by the Licensee. The Licensee will pay one-fifth of said amount upon the execution of this Agreement, and the remaining four-fifths is to be liquidated by crediting against said remaining four-fifths, one-third of all payments under Section

1 of Article Three hereof until said amount is liquidated.

Section 2. The Licensee releases the Licensors, jointly and severally, from any claims or liability on account of past infringement of any United States Letters Patent or rights to or under such Letters Patent owned or controlled by the Licensee, and from all claims or liabilities of any nature whatsoever arising out of, any acts of any of the Licensors, or any contracts of any of the Licensors with third parties to the date of this Agreement.

Section 3. In the event of any default hereunder or of any breach of covenant by the Licensee, or in the event of the bankruptcy or insolvency of the Licensee or of the appointment of a receiver for its property (not discharged within thirty days after appointment) the obligation of the Licensors to postpone collection of such part of the amount due and payable as provided in Section 1 of this Article Six, [fol. 52] as shall then be unpaid, shall immediately cease and terminate, whether or not this Agreement shall have then been cancelled or terminated by the Licensors as provided for in this Agreement.

Article Seven. Notices

Until written notice of change of address is served by either party upon the other, any notice or request with reference to the subject matter of this Agreement shall be deemed to have been sufficiently given, when, if given to the Licensors, it shall be addressed to the Radio Corporation at its office, No. 233 Broadway, New York City, and when, if given to the Licensee, it shall be addressed to the Licensee at its office, No. 238 Main Street, Cambridge, Mass., and in either case sent by registered mail.

Article Eight. Term and Termination

Section 1. This Agreement shall continue in force until January 1, 1934, unless sooner terminated as hereinafter provided. If the Licensee shall properly and faithfully perform all of its obligations hereunder, the Licensee shall have the option, by giving not less than six months' written notice prior to January 1, 1934, of extending the period of this Agreement until January 1, 1939, unless sooner terminated as hereinafter provided.

Section 2. In the event of the failure by the Licensee at any time during the continuance in force of this Agreement to render any of the statements called for herein upon any of the prescribed dates, or to pay all of the royalties required hereunder when due, or to comply with any of the other obligations of this Agreement, for thirty (30) days after notification from the Radio Corporation by registered mail to the last known place of business of the Licensee, of any such default, this Agreement shall cease and terminate, at the option of the Raido Corporation, thirty (30) days after notice in writing by registered mail to that effect has been forwarded to the Licensee. The Radio Corporation shall also have the right to terminate this Agreement at any time upon the bankruptcy or insolvency of the Licensee or the appointment of a receiver for its property (not discharged within thirty (30) days after appointment), and upon the exercise of such right this Agreement shall [fol. 53] terminate thirty (30) days after notice in writing by registered mail to that effect has been forwarded by the Radio Corporation to the Licensee. No cancellation shall release the Licensee from any of the liabilities accruing to the Licensors hereunder prior to the time such cancellation becomes effective. No failure on the part of the Radio Corporation to exercise its right of cancellation hereunder for any one or more defaults shall be construed to prejudice its right of cancellation for any subsequent default.

Section 3. The termination of this Agreement shall not release the Licensee from any of its liabilities accruing prior to such termination. The expression "term of this Agreement", or similar expression, wherever used herein, shall be deemed to mean the period during which this Agreement shall remain in force as herein provided.

Article Nine. Assignments

Neither this Agreement nor any of its benefits shall be directly or indirectly assigned, transferred, divided or shared by the Licensee to or with any person, firm or corporation whatsoever, without the written consent of the Radio Corporation. This Agreement shall inure to the benefit of the successors and assigns of the several Li-

censors, but shall not inure to the benefit of the successors, assigns, or any legal representatives of the Licensee, without the written consent of the Radio Corporation.

In witness whereof, the parties hereto have caused these presents to be executed by their proper officers thereunto duly authorized, and their corporate seals to be hereunto affixed, as of the day and year first above written.

Radio Corporation of America, by J. G. Harbord, President. R. D. O. C. Attest: L. MacConnach, Secretary. (Seal.)

General Electric Company, by E. W. Allen, Vice-President. H. E. V. Attest: W. Marshall, Asst. Secretary. (Seal.)

[fol. 54] Westinghouse Electric & Manufacturing Company, by Walter Cary, Vice-President. V. S. B. Attest: Warren H. Jones, Secretary. (Seal.)

Raytheon Manufacturing Company, by Laurence K. Marshall, President. Attest: LeRoi J. Williams, Secretary. (Seal.)

B

(Agreement Dated March 19, 1929)

Referring to the agreement of even date herewith between Radio Corporation of America, General Electric Company and Westinghouse Electric & Manufacturing Company (therein and hereinafter called Licensors) and Raytheon Manufacturing Company (therein and hereinafter called Licensee), it is hereby agreed as follows:

(1) That the Licensee, in hereafter asserting any of its own patent rights, shall not, by any of the provisions of the aforesaid agreement, be prejudiced with respect to the scope and validity of any of the Licensors' patents on Tubes of the gas type;

(2) That, during the term of said agreement, Tubes, consisting of an envelope which contains two or more electrodes and a fixed conducting gas upon which the conductivity of the device depends, whether or not including vapor, but without means for producing heat in either the gas or the electrodes or any other parts, except such heat as may be produced by the passage of electricity through the gas, sold by the Licensee for use in supplying power of voltage

regulation to radio receiving sets, shall not be subject to payment by the Licensee of the royalty provided by Section 1 of Article Three of said agreement;

(3) That, notwithstanding the general releases to the Licensors contained herein and in Section 2 of Article Six of the said agreement, if hereafter any claimant for damages alleged to have arisen in the operation of a certain clause designated "9" in certain license agreements and "8" in certain other license agreements heretofore made [fol. 55] by the Licensors with manufacturers of radio receiving apparatus (said Clause "9" having been the subject of injunction in the District Court of the United States for the District of Delaware) becoming licensed under all or a substantial part of the patents under which a license is granted by said agreement, shall obtain a pecuniary recognition of its claim in consequence of judgment, or agreement of settlement, or otherwise, then the Licensee shall become entitled to assert its claim for such damages and none of the Licensors shall be entitled to plead said releases in bar thereof but shall not be prejudiced hereby in the making of any other defenses which they or any of them now have to such claim; and if the Licensee shall be successful in obtaining recognition of its claim for such damages it shall not be entitled in any event to a total amount greater than the largest amount obtained by any other claimant and shall only be entitled to the payment thereof by crediting the same against the royalties payable under said agreement;

(4) That, in all respects, the provisions of Section 8 of Article Two of said agreement shall apply to and bind Raytheon Inc. (a Massachusetts corporation), provided that Raytheon Inc. shall not be required thereby or hereby to grant any license outside of the fields specified in Section 2 of Article Two of the said Agreement;

(5) That the Licensors, jointly and severally, release the Licensee and Raytheon, Inc. (a Massachusetts Corporation) jointly and severally, from any claims or liabilities on account of past infringement of any United States Letters Patent or rights to or under such Letters Patent owned or controlled by the Licensors, or any of them, and from all claims or liabilities of any nature whatsoever arising out

of, any acts of the Licensee or said Raytheon, Inc. or actions under any contracts of the Licensee or said Raytheon, Inc. with third parties to the date hereof; and

(6) That the Licensee and Raytheon, Inc. jointly and severally, release the Licensors, jointly and severally, from any claims or liabilities on account of past infringement of any United States Letters Patent or rights to or under such Letters Patent owned or controlled by the Licensee [fol. 56] or Raytheon, Inc., and from all claims or liabilities of any nature whatsoever arising out of, any acts of any of the Licensors or actions under any contracts of any of the Licensors with third parties to the date hereof.

Radio Corporation of America, by J. G. Harbord, President. (Seal.) General Electric Company, by E. W. Allen, Vice-President. Westinghouse Electric & Mfg. Company, by Walter Cary, Vice-President. Raytheon Manufacturing Company, by Laurence K. Marshall, President. Raytheon, Inc., by D. T. Schultz, Asst. Treas.

[On letterhead of Choate, Hall & Stewart.]

Boston, Mass., March 7, 1934.

Edward Williamson, Esq., 161 Devonshire Street, Boston, Massachusetts.

Dear Mr. Williamson:

I return the motion to amend the bill of exceptions. I understand that it is precisely the same as the previous motion except that it is entitled at law. The defendant waives any hearing on the allowance of the bill of exceptions, reserving any rights it may have on the question of whether the motion should be in equity or at law.

Yours truly, Richard C. Curtis.

RCC JC. Enclosure.

In United States District Court

Plaintiff's Bill of Exceptions re Motion for Framing Jury Issues—Filed and Allowed April 6, 1933

Reference may be had to the pleadings in the case of Raytheon Manufacturing Company v. Radio Corporation

of America, law No. 5021, and to the motion for transfer to equity, and to the plaintiff's motion for framing jury issues filed on or about November 12, 1932. This motion was heard by the court on April 4, 1933, without the in- [fol. 57] troduction of any evidence, and was denied and the plaintiff duly excepted to such denial and said exception was saved by the court. The plaintiff prays that this, its bill of exceptions, be allowed, and it hereby claims an appeal to the Circuit Court of Appeals from the order denying the motion.

By its Attorneys, Edward F. McClennen, E. Curtiss Mower, Jr.

April 6, 1933, this bill of exceptions allowed.
James A. Lowell, Judge of the United States District Court.

The defendant waives any hearing on the allowance.
Choate, Hall & Stewart, Richard C. Curtis.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S BILL OF EXCEPTIONS RE MOTION TO RESCIND ORDER ALLOWING TRANSFER—Filed and Allowed February 7, 1934

Reference may be had to the pleadings and to motion by plaintiff to rescind or to vacate or to supersede the order of this court entered on or about November 8, 1932, whereby the defendant's motion to transfer to equity was allowed, filed on or about January 3, 1934. This motion was heard by the court on January 22, 1934, without the introduction of any evidence and was denied on February 2, 1934. The plaintiff hereby duly excepts to the order of the court denying such motion and prays that this, its bill of exceptions, be allowed.

By its Attorneys, Edward F. McClennen, E. Curtiss Mower, Jr.

February 7, 1934, this bill of exceptions allowed.
Elisha H. Brewster, Judge of the United States District Court.

[fol. 58] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S BILL OF EXCEPTIONS RE MOTION FOR ENTRY OF FINAL DECREE—Filed and Allowed March 1, 1934

At the motion session on February 19, 1934, the plaintiff presented its motion filed on or about February 12, 1934, for final decree, which is incorporated herein by reference. Thereupon the entire proceeding was as stated below:

Mr. McClennen: If your Honor please, I don't know whether your Honor has had opportunity to look at the motion or whether I shall state it.

Brewster, J.: I have read it.

Mr. McClennen: If we are in equity—and for the time being at least we have every appearance of being in equity—there must be a plaintiff in equity, and as the Radio Corporation of America has a validly executed release which we claim to be unenforceable, I assume that the Raytheon Company must be the plaintiff in equity. Being the plaintiff in equity, we desire nothing further of the court in equity, and we ask to dismiss what is tantamount to what is our bill in equity before any hearing of facts. We believe that under the decisions we are entitled to dismiss it any time before hearing, since nothing has happened in equity to affect the rights of the parties.

If we are wrong and cannot dismiss it before hearing in equity, then we have stated in our motion the position that we are prepared to take.

If the court in equity insists that this case is for hearing in equity, we come unwillingly to that hearing and have no evidence to offer in support of any allegations and await the consequences of that situation.

It is obvious that there is no way of presenting this question to the Circuit Court of Appeals until there has been a final decree here, and we ask for a final decree here.

So that the question may go up, we would like a final decree of the kind that we seek. We await such final decree as the court adjudges that we ought to have. We are mani- [fol. 59] festly in this embarrassing position: That if we are right that this matter is not one to be heard in equity, we cannot come forward and save our rights and try the case—we cannot try a question of fact to the court of equity and save our rights to try it over again before a jury. We cannot come forward voluntarily to a hearing on the merits.

Therefore we are here asking the court to enter a final decree in equity, we are taking the consequences if such a decree rightfully be entered otherwise than in our favor.

I know of no other way. I have thought of no other way in which to preserve the rights which we contend for to get the decision of the Circuit Court of Appeals on the question if anything is done to our prejudice.

Brewster, J.: If this matter went to hearing on the merits and the court should find that there was no equitable defence to the release being under seal, what form—what would the form of the decree be then? What would be the form of the final decree to be entered if there should be a hearing on the merits which should go against your clients?

Mr. McClennen: Your Honor's question puts what I believe to be the indication of the correctness of our position that there can be no decree. I know of no decree which can be entered here.

Brewster, J.: I suppose I could find, couldn't I, the fact that there were no equitable defences to the release which could be recognized by a court of equity, and that would dispose of the equitable phase of it. It is up on the equitable side for the purpose of determining whether the release under seal can be avoided. Suppose, after hearing, I should find and rule that the release was good even in a court of equity. I would simply enter a decree that the release was good. Do you want me to do that?

Mr. McClennen: Of course we don't want you to do that; we want you to enter a final decree.

Brewster, J.: If you introduce no evidence to show that the release was voidable, I would have to enter such a decree, wouldn't I?

Mr. McClennen: Of course I think not, not for reasons which I have argued before——

[fol. 60] Brewster, J.: You are willing to take your chances on the legality of the former action of Judge Lowell and myself?

Mr. McClennen: I am willing—"willing" is a strong word. I see no way out of taking some chances. I am firmly convinced, whether rightly or wrongly, that I cannot offer any evidence in the court of equity. And if your Honor should set this down at this moment for hearing on the merits against my protest and would appoint a com-

missioner now, I would be prepared to reiterate the statement I made in the motion.

Brewster, J.: In other words, you make no move to avoid the release?

Mr. McClennen: I would present no evidence in equity on that inquiry.

Brewster, J.: Judge Lowell said it couldn't be done at law. That is the question the higher court has to decide.

Mr. Hall: May it please the court. Of course I think, your Honor, that this case was sent here to determine the validity of the release by Judge Lowell. This is the fourth time the matter has come before the court. The suggestion your Honor makes as to a final decree adjudging that the release was valid and binding, of course would seem to me ought to be in the order. I think with that in the order that there might be no misunderstanding in the future, no misunderstanding of what Judge Lowell has found, and no misunderstanding as to what your Honor has found, so that the purpose of Judge Lowell should not be thwarted, it would be proper to have your Honor make certain findings and the findings I suggest are these:

"(1) That the court at law on November 8"—and I have a copy of these findings here—"ruled that the release was valid at law.

(2) That the case was accordingly, transferred to equity.

(3) That the plaintiff has disclaimed any right to avoid the release in equity"—which is true.

"(4) That the plaintiff has stated in open court that it has no evidence on which the release can be avoided in equity."

[fol. 61] Such findings of course—

Brewster, J.: That last wouldn't be quite right, would it? If you modified it so as to say "The attorney in open court stated he had no evidence which he wanted to offer" that might cover it. They may have had evidence, but didn't feel they wanted to produce it.

Mr. Hall: That is true. That is a proper correction. But, if you will read the third paragraph, the plaintiff contends—"The plaintiff tenders in equity no evidence in support of any right to relief in equity and now has no such

evidence and therefore, before hearing, announces the conclusion of its evidence in equity in support of any such right in equity to the same extent and with the same effect as if the court in equity should now have set this case for hearing on evidence against the plaintiff's protest."

Brewster, J.: What are you reading from now?

Mr. Hall: The plaintiff's motion for final decree.

Brewster, J.: All right.

Mr. Hall: I have prepared such findings if your Honor cares to have them. I hand these, and a draft of decree, to you.

Brewster, J.: All right.

Mr. McClennen: I judge that your Honor is taking the matter under advisement.

Brewster, J.: You may send up a brief, if you care to, unless you are willing to say you don't care to have me consider this brief. I should think Mr. Hall's suggestion was in order.

Mr. McClennen: May I merely note my protest to your making any one of these findings and ask that my exception be saved if you make any of them.

Brewster, J.: Your exceptions may be saved.

Mr. Hall: I suppose this is true; that this is on Mr. McClennen's motion for final decree—that it appears it is his motion for final decree and not a motion of the defendants.

Brewster, J.: Yes.

Mr. McClennen: Would your Honor appoint the stenographer as commissioner, or whatever the form is in equity; [fol. 62] if you deal with any actual questions? Mrs. Windsor is here and I would like to have her appointed commissioner——

Brewster, J.: The findings I have been requested to make are matters of record in this court. I wouldn't need the evidence.

Mr. McClennen: I should think that is true, and that is one additional reason for my objection to your making any findings because the records speaks so clearly.

Brewster, J.: It can not be a very serious matter. The stenographer may be appointed commissioner in case you want to use what happened here today as a part of the record. There is a decree here, Mr. McClennen, which I might just as well act on now and have your rights pre-

served in the record. It is a final decree disposing of this case and transferring it back to the law side.

Mr. McClennen: You are referring to the one Mr. Hall has just handed to you?

Brewster, J.: Yes.

Mr. McClennen: Will your Honor, in any event, modify it by calling it a final decree so this may be called a final disposition of the matter?

Brewster, J.: By sending it back to the law side it must be a final decree.

Mr. McClennen: Your Honor will save my exception to the entering of this decree?

Brewster, J.: Yes.

Mr. Hall: He only asked for the entry of a decree himself.

Brewster, J.: He can not object to a final decree, but he might object to it in this form.

Mr. McClennen: I object to the change from the decree sought by my motion.

Mr. Hall: Have you any decree, Mr. McClennen, you want entered, other than that?

Mr. McClennen: The decree which I want is indicated by my motion.

The court made the findings of fact handed up by the de-
[fol. 63] fendant's counsel as above stated, which appear on file and are incorporated herein by reference.

The court ordered the entry of the decree as handed up by defendant's counsel as above stated, after adding the word "final", which appears on file.

The plaintiff duly excepted to the making of the findings and to the order for the entry of the decree. These exceptions were allowed.

Thereafter on February 19, 1934, the final decree was entered.

The plaintiff prays that this, its bill of exceptions, be allowed.

By its Attorney, Edward F. McClennen.

March 1, 1934. Hearing on allowance of bill of exceptions; bill of exceptions allowed.

Elisha H. Brewster, Judge of the United States District Court.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S PETITION FOR APPEAL—Filed March 9, 1934

The plaintiff, aggrieved by the final decree entered in this case on February 19, 1934, and by the proceedings on which the same is based, in the respects described in the assignment of errors herewithin, appeals to the Circuit Court of Appeals for the First Circuit from said final decree except so far as said decree transfers this case back to law, and from said proceedings, and prays that this, its claim of appeal, may be allowed and that the transcript of the record proceedings, bills of exceptions and papers upon which the said decree was based, duly authenticated, may be sent to said Circuit Court of Appeals.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S ASSIGNMENT OF ERRORS

The plaintiff assigns that the District Court committed the errors following:

First. In allowing on or about November 8, 1932, the defendant's motion to transfer case to equity for a preliminary hearing upon the validity of the release given by the plaintiff.

[fol. 64] Second. In denying on or about April 4, 1933, the plaintiff's motion for framing jury issues.

Third. In denying on or about February 2, 1934, the plaintiff's motion to rescind or to vacate or to supersede the aforesaid order of this court entered on or about November 8, 1932, whereby the defendant's motion to transfer to equity was allowed.

Fourth. In adjudging affirmatively, without evidence and in equity in its findings and in its final decree entered February 19, 1934, upon the plaintiff's motion of February 12, 1934, but contrary thereto, that the release set forth in the defendant's answer and elsewhere is both valid and binding and that the further proceedings at law shall be in accordance with this decree.

By its Attorneys, Edward F. McClennen, E. Curtiss Mower, Jr.

March 9, 1934. Bond approved and above appeal allowed not as a supersedeas.

Elisha H. Brewster, United States District Judge.

RECITAL AS TO BOND AND CITATION

Also on the said ninth day of March, 1934, a bond on appeal for costs in the sum of $250 was filed by the plaintiff, Laurence K. Marshall of Cambridge, Mass., and David T. Schultz of Brookline, Mass., acting as sureties, and said bond was approved by the court on the same day.

A citation on appeal was issued on March 9, 1934, being made returnable in the United States Circuit Court of Appeals on April 9, 1934. Service of said citation was duly acknowledged by the attorney for the defendant.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S PRÆCIPE—Filed March 19, 1934

In preparing the record the clerk will please print the following:

1. The writ.

2. Plaintiff's declaration as amended by the disclaimer filed March 5, 1932, and by the addition of the second count filed March 21, 1932.

[fol. 65] 3. Defendant's answer as amended November 8, 1932.

4. Defendant's motion to transfer, and allowance thereof November 8, 1932.

5. Plaintiff's bill of exceptions allowed November 9, 1932.

6. The amendment thereto allowed March 8, 1934.

7. Amendment to defendant's answer in December, 1932.

8. Plaintiff's motion for jury issues and denial thereof April 4, 1933.

9. Plaintiff's bill of exceptions allowed April 6, 1933.

10. Plaintiff's motion to rescind, vacate or supersede filed January 3, 1934, and denial thereof on February 2, 1934.

11. Plaintiff's bill of exceptions allowed February 7, 1934.

12. Plaintiff's motion for final decree filed February 12, 1934.

13. Findings of fact and rulings made February 19, 1934.

14. Plaintiff's bill of exceptions allowed March 1, 1934.

15. Final decree.

16. Plaintiff's petition for appeal and assignment of errors, and allowance thereof.

17. Citation on appeal and acceptance of service thereof.

18. Præcipe.

Edward F. McClennen, E. Curtiss Mower, Jr., Attorneys for Plaintiff.

March 19, 1934.

Due and sufficient service of the above præcipe is hereby accepted.

Richard C. Curtis, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S CROSS-PRÆCIPE—Filed March 23, 1934

In preparing the record the clerk will please print the following in addition to the papers named in the præcipe:

1. The defendant's demurrer and the order overruling the same on March 22, 1932.

2. The defendant's motion to strike out all allegations contained in the plaintiff's writ and declaration relating to [fol. 66] Raytheon Manufacturing Company, a Delaware corporation, filed on January 30, 1932, and the denial thereof on March 22, 1932.

3. The defendant's motion for specifications and the plaintiff's answers thereto, items number 1 and number 24 only.

Richard C. Curtis, Attorney for Defendant.

Due and sufficient service of the above cross-præcipe is hereby accepted and the omission of items two through

twenty-three and items twenty-five through twenty-seven in the defendant's motion for specifications and the plaintiff's answers thereto is hereby approved.

E. Curtiss Mower, Jr., Attorney for Plaintiff.

Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 67 & 68] [Memorandum. Orders of enlargement of time for docketing case to, and including, August 1, 1934, are here omitted. A. I. Charron, Clerk.]

[fol. 69] In United States Circuit Court of Appeals for the First Circuit, October Term, 1934

No. 2946

Raytheon Manufacturing Company, Plaintiff, Appellant,

v.

Radio Corporation of America, Defendant, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Wilson, Morton and Morris, JJ.

Opinion of the Court—Filed April 8, 1935

Morris, J.

This is an appeal by the plaintiff, appellant, from what is termed a final decree in equity entered Feb. 19, 1934, in the United States District Court of Massachusetts.

The action was brought December 14, 1931, by the plaintiff as an action at law. It is based upon the Anti-Trust Laws, U. S. C. A., Title 15, Chap. 1, Sec. 15.

Triple damages are sought totaling $9,000,000. The plaintiff's declaration as amended, contains two counts, one under the Sherman Act and the other under the Clayton Act. The facts set forth are substantially the same in the two counts. The plaintiff alleges that in the year 1926, it was engaged in the manufacture, distribution and sale in inter-state commerce of tubes known as Raytheon rectify-

ing tubes for use in radio receiving sets and that it had built up a large and valuable good will in this interstate commerce business and a large trade from which it realized [fol. 70] in 1926 a net profit of $454,935.00, and that the defendant through manipulation and conspiracy with others has established a monopoly and totally destroyed plaintiff's business.

The defendant, the present appellee, for answer, filed a general denial and set up a general release under seal alleged to have been executed on or about March 19, 1929. Plaintiff's declaration referring to this alleged release says it was executed under legal duress. Defendant's answer denies duress.

After some sparring between the parties involving a motion to strike, demurrer, a motion for specifications and various amendments on one side and the other, the pleadings were finally perfected.

On October 10, 1932, the defendant filed a motion to transfer the case to equity for a preliminary hearing upon the validity of the release. The motion was based upon the following grounds. "1. In its answer the defendant has alleged that the plaintiff released the defendant from all claims. 2. The plaintiff has conceded in paragraphs 36 and 37 and counts 1 and 2 of its declaration that the plaintiff did execute such a release, but the plaintiff alleged that the said release was executed under duress. 3. The said release was under seal in that the plaintiff adopted the seal of the other parties who signed the release. 4. A release under seal cannot be avoided in an action at law. 5. Great delay and expense would be saved by preliminary hearing on this issue."

On November 8, 1932, the defendant's motion to transfer the case to equity was granted by the District Judge, and on November 9, 1932, plaintiff's bill of exceptions to the order was filed and allowed.

On November 12, 1932, the plaintiff filed a motion for the framing of an issue to be tried by jury upon the issue of the validity of the release executed by the plaintiff. The motion was denied April 4, 1933.

[fol. 71] On January 3, 1934, the plaintiff filed a motion on the law side of the docket that the order of November 8,

1932, transferring the case to equity be rescinded or be vacated or be superseded. In this motion the plaintiff disclaimed any right or remedy in equity to be relieved from the operation of the release, but claimed that a court of equity is without jurisdiction of these issues when presented in an action at law in which as to such duress neither party claims an equitable right or seeks an equitable remedy; that the plaintiff has and claims a right to trial by jury on this issue which arises in an action at law.

The foregoing motion was denied February 2, 1934.

On February 12, 1934, the plaintiff filed the following motions for entry of final decree:

"The plaintiff insists on its objections to the jurisdiction of this court in equity and to the order of transfer thereto and without waiving said objection says as follows:

1. The plaintiff hereby discontinues, becomes nonsuit and dismisses before any hearing in equity any and all allegations and claims that in equity the release alleged in the plaintiff's declaration and in the defendant's motion for transfer is invalid in equity more than at law and that the plaintiff has any equitable right to a decree declaring said release invalid or to any relief in equity.

2. The plaintiff admits and avers that it has no right in equity or to any remedy therein and because, and that, it has a plain, adequate and complete remedy at law in that a court of law will not give force or effect to a release obtained in the manner alleged and having said unlawful effect if enforced.

3. The plaintiff tenders in equity no evidence in support of any right to relief in equity and now has no such evidence and, therefore, before hearing, announces the conclusion of its evidence in equity in support of any such right in equity, to the same extent and with the same effect as if the court in equity should now have set this case for hearing of evidence against the plaintiff's protest.

4. This suit in equity is now before hearing ripe for final disposition.

Wherefore the plaintiff moves that a final decree be entered in equity No. 3767, (1) dismissing said suit in equity [fol. 72] No. 3767 for the reasons aforesaid, or (2) terminating said suit in equity No. 3767 in such manner as, in this state of the record, equity requires and (3) thereupon

returning the papers originally filed in law No. 5021 to the court of law."

The above motion came on for hearing February 19, 1934. After hearing, the District Judge filed a rescript of his findings of fact and conclusions of law in which he set forth the various motions and rulings thereon and in conclusion said "upon the issues submitted aforesaid to the Court sitting in equity, I, therefore, rule that the release is valid."

A final decree was entered in accordance with the findings of the court, February 19, 1934.

No evidence was offered or introduced at any stage of the proceedings but the court examined a copy of the contract between the parties embodying the release.

Exceptions were taken, filed and allowed to each of the foregoing orders.

Plaintiff's petition for appeal is as follows:

"The plaintiff, aggrieved by the final decree entered in this case on Feb. 19, 1934, and by the proceedings on which the same is based, in the respects described in the assignment of errors herewithin, appeals to the Circuit Court of Appeals for the First Circuit from said final decree except so far as said decree transfers this case back to law, and from said proceedings, and prays that this, its claim of appeal, may be allowed and that the transcript of the record proceedings, bills of exceptions and papers upon which the said decree was based, duly authenticated may be sent to said Circuit Court of Appeals."

The order of the District court upon plaintiff's petition is as follows: "March 9, 1934. Bond approved and above appeal allowed not as a supersedeas."

Plaintiff assigned the following alleged errors:

"First. In allowing on or about November 8, 1932, the defendant's motion to transfer case to equity for a preliminary hearing upon the validity of the release given by the plaintiff.

Second. In denying on or about April 4, 1933, the plaintiff's motion for framing jury issues.

[fol.73] Third. In denying on or about February 2, 1934, the plaintiff's motion to rescind or to vacate or to supersede the aforesaid order of this court entered on or about

November 8, 1932, whereby the defendant's motion to transfer to equity was allowed.

Fourth. In adjudging affirmatively, without evidence and in equity, in its finding and in its final decree entered February 19, 1934, upon the plaintiff's motion of February 12, 1934, but contrary thereto, that the release set forth in the defendant's answer and elsewhere is both valid and binding and that the further proceedings at law shall be in accordance with this decree."

No judgment of any kind has been entered in the action at law. It is pending for trial. During the progress of the oral arguments a question was raised as to whether or not this court had jurisdiction to entertain the appeal. The defendant does not challenge the plaintiff's right to appeal any of the orders and decrees in question. Both parties express the hope that, in the interests of directness and economy, this court will entertain it. We have every disposition to deal in a practical way with practical questions, but as our jurisdiction is involved, we cannot pass the matter by without consideration. Consent of the parties is not sufficient. The right of appeal is strictly statutory. The provisions of the judicial code on which appeals ordinarily rest are sections 128 and 129 (28 U. S. C. A. Sec. 225, 226). Section 129 relates to appeals from interlocutory orders and decrees in proceedings for injunctions and receivers. Appeals are referred to in Section 274b (28 U. S. C. A. 398), but there is nothing in its language expressly authorizing the right of appeal from an interlocurtory order or decree. The question is whether the order of the district court entered November 8th, transferring the case from law to equity is appealable by reason of the provisions of section 129 when construed in conjunction with section 274b.

The latter section reads as follows:

"In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity [fol. 74] of filing a bill on the equity side of the court. The defendant shall have the same right in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject-matter of the suit may thus be obtained by answer or plea. In case affirmative relief is

prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the record as law and justice shall require."

The right of the defendant to file an equitable defense in the action at law is not questioned. Upon its being so filed the district court transferred the issues raised to the equity side of the docket for trial by the court. This was in a sense an interlocutory order. As to whether or not an appeal therefrom to this court would lie was at the time of the hearing a question upon which circuit courts of appeal had reached conflicting decisions. In the following cases jurisdiction was denied. Emlenton Refining Co. v. Chambers, 14 Fed. (2nd) 104; Weaver v. Atlas Oil Co., 39 Fed. (2d) 847; Cox v. Graves, Knight & Graves, Inc., 55 Fed. (2d) 217; while in the case of American Cyanamid Co. v. Wilson & Toomer Co., 62 Fed. (2d) 1018, jurisdiction was sustained.

The question has now been determined by the opinion of the Supreme Court in the case of Enelow v. New York Life Insurance Company, in an opinion handed down Jan. 7, 1935. We quote from the language of Chief Justice Hughes as follows:

"It is thus apparent that when an order or decree is made under section 274b, requiring, or refusing to require, that an equitable defense shall first be tried, the court exercising what is essentially an equitable jurisdiction, in effect grants or refuses to grant an injunction restraining proceedings at law precisely as if the court had acted upon a bill of complaint in a separate suit for the same purpose. Such a decree was made in the instant case, and therefore, [fol. 75] although interlocutory, it was appealable to the Circuit Court of Appeals under section 129."

This appears to settle the jurisdictional question, as it is quite clear from a reading of the plaintiff's petition for appeal and its allowance by the District Court that the appeal was not only from what was termed a final decree but from all orders on which it was based, and we now proceed to consider the merits of the controversy.

The several motions and rulings of the court present rather unusual and somewhat tangled questions involving distinctions between the jurisdiction of a court of law as distinguished from equity jurisprudence—distinctions that are by no means clearly marked.

"In suits at common law where the value of the controversy shall exceed twenty dollars the right of trial by jury shall be preserved." Such is the guarantee of the Seventh Amendment to the Federal Constitution. U. S. C. A. Part 2, page 581.

Neither the Congress nor the courts can deprive a litigant of this right. It follows that if the plaintiff in this action is entitled to a trial by jury of the issues raised by the pleadings it must be held error on the part of the district court to transfer the case from law to equity against plaintiff's protest.

If error was committed in this first order, all the subsequent orders made by the court of equity must be extra-jurisdictional.

If the order of transfer was right, no sound reason is presented why the subsequent orders should not be sustained and the final decree of the district court affirmed. It may be conceded that if the defendant's answer and plaintiff's anticipatory replication set forth any ground for equitable relief, no error was committed by the order of transfer dated November 8, 1932, but no equitable relief is sought. The release was set up as a defense in the action [fol. 76] at law. The order of transfer to equity cannot be sustained upon this ground.

It has been argued that a distinction should be made between a release obtained by fraudulent misrepresentations where the instrument is consciously executed knowing it to be a release and one obtained by trickery such that the signer has no knowledge of the contents of the paper he has signed. It is contended that the latter may be pleaded in bar of an action at law but that the former can be set aside only in a court of equity. Cases may be found supporting this distinction. See Heck c. Missouri Pac. Ry. Co., 147 Fed. 775; Hill v. Northern Pacific Ry. Co., 104 Fed. 754; Vandervelden v. Chicago & N. W. Ry. Co., 61 Fed. 54; Hoad v. New York Central R. R. Co., 6 Fed. Supp. 565. A long list of them may be found in the opinion of Lowell, J., in the case of Pringle v. Storrow, 9 Fed. (2d) 464.

A very exhaustive discussion of the point may be found in the case of Wagner v. National Life Ins. Co. of Montpelier, Vt., 90 Fed. 395, and the Court composed of Taft and Lurton, Circuit Judges, and Clark, District Judge, reached the conclusion that it is proper in a suit at law for the plaintiff to meet a plea of release by a replication that the release was obtained by fraud, whether the fraud is in the execution or in misrepresentation as to material facts inducing execution, where the issue involves simply a question of fraud between the parties. However, it is noted that the release in issue in that case was not under seal.

While it is true that fraud often furnishes ground for equitable relief, it more often creates an issue of fact peculiarly for a jury in actions at law. There seems to be no logical reason for submitting to the jury issues of fraud in ordinary actions of contract and denying to submit the issue in an action involving a release which is no more than a form of contract. Carey v. McMillan, 289 Fed. 380, 387.

The courts in this jurisdiction, in more recent cases, both federal and state, have made no such distinction, but when a [fol. 77] question of fraud has been raised in a replication to a simple release, not under seal, pleaded in bar, the entire issue has been submitted to a jury in a single trial in a court of law. Insurance Co. v. Bailey, 13 Wall. 616; Cable v. U. S. Life Ins. Co., 191 U. S. 288; Kansas City Southern Ry. Co. v. Martin, 262 Fed. 241; Southern Ry. Co. v. Clark, 233 Fed. 900; Columbia-Knickerbocker Trust Co. v. Abbott, 247 Fed. 833; Plews v. Burrage, 274 Fed. 881; Suravitz v. Pristasz, 201 Fed. 335; American Sign Co. v. Electro-Lens Sign Co., 211 Fed. 196. The last mentioned case contains an extended discussion of the point.

We hold that the plaintiff cannot be deprived of his right to a jury trial upon any such narrow grounds as what now appears to be a fast disappearing distinction between a release obtained by fraudulent misrepresentations and one obtained by fraud in its execution.

No reason is suggested why a release obtained by duress should receive more favorable consideration than one obtained by fraud. In fact if it were a moral question the odds would be in favor of the latter. It has been held that the same principles of law apply. Fairbanks v. Snow, 145 Mass. 153.

The defendant's plea alleges that the release is under seal and it is argued that therefore it can be set aside only by a separate action in equity. If this is so, it follows that the order of the district court transferring the case from law to equity must be sustained.

An examination of the release discloses that there is no seal set opposite the signature of the plaintiff. Five signatures appear with only one seal which is set opposite the name of the General Electric Company. It is alleged in defendant's motion to transfer the case to equity that, "said release was under seal in that the plaintiff adopted the seal of the other parties who signed the release." Whether the adoption of a seal affixed by another person [fol. 78] is a question to be determined by extraneous evidence when there is nothing in the final wording of the instrument indicating that the parties, "have hereunto set their hand and seal" raises a rather delicate question but one which we do not find it necessary to determine. See Hudson v. Webber, 104 Me. 429 Barnet v. Abbott, 53 Vt. 120; State v. Humbird, 54 Md. 327; Jacksonville, etc., Ry. v. Hooper, 160 U. S. 514-19. It is quite evident that the judge of the district court treated the release as under seal. No question to the contrary appears to have been raised before him by plaintiff's counsel. We do not think the question should be raised for the first time in this court. It well might have been considered that the plaintiff adopted the seal that was affixed to the release. C. F. Starita Co. v. Compagnie Havraise Peninsulaire, 52 Fed. (2d) 58; Cammack v. Slattery & Bros., Inc., 241 N. Y. 39; Tasker v. Bartlett, 5 Cush. 359.

Treating the release as a document under seal, it does not necessarily follow that the plaintiff should be deprived of his right to a trial by jury when the nature of the present action is considered. Neither does it follow that an order transferring the case from law to equity against the protest of the plaintiff can be sustained when no affirmative equitable relief is sought.

We are cognizant of the fact that following the lead of the Supreme Court in Hartshorn v. Day, 19 How. 211, (1856), and George v. Tate, 102 U. S. 564, (1880), various lower federal courts have maintained a distinction between a simple contract not under seal and a specialty holding to the ancient doctrine that a sealed instrument can be set

aside for fraud only in a court of equity. The Hartshorn case, because of its complications, was clearly a case for a court of equity. The George case, was tried before a jury but evidence of fraud was ruled out, and the ruling sustained by the Supreme Court. We find no suggestion that the procedure followed in that case was improper.

[fol. 79] After citing the above mentioned cases defendant cites to the point, that a sealed instrument cannot be set aside except in equity, three cases in none of which a sealed instrument was involved. Union Pacific R. Co. v. Syas, 246 Fed. 561; Cavender v. Virginia Bridge & Iron Co., 257 Fed. 877; Penn R. R. Co. v. Hammond, 7 Fed. (2d) 1010. It is rather significant that the industry of counsel has failed to cite for our examination a single Supreme Court case reaffirming the principle laid down in George v. Tate, supra.

While 274b of the Judicial Code permits the filing of equitable defenses in an action at law, it does not change legal defenses into equitable defenses. Although defendant's answer may be filed as an equitable defense, it does not follow that it is such. It must be considered as though the allegations of the answer and replication were set forth in an independent suit in equity. Liberty Oil Co. v. Condon Bank, 260 U. S. 235; People of Porto Rico v. Livingston, 47 Fed. (2d) 712.

"In view of the decisions above referred to, we are unable to agree that in all cases in which no affirmative equitable relief is sought by either plaintiff or defendant, that one who signs a release, does, by the mere act of affixing a seal thereto, necessarily convert a legal into an equitable defense thereby depriving himself of his constitutional rights to a trial by jury if it later appears that the transaction was conceived in fraud or was the result of duress. Cases involving the reformation or rescission of written contracts which by reason of mistake fail to express the intention of the parties of which McIssac v. McMurray, 77 N. H. 466, is an illustration should be carefully distinguished.

While it may not appear that the case of George v. Tate, has been expressly overruled it appears to have been questioned and sometimes disregarded. Am. Mills Co. v. Am. Surety Co., 260 U. S. 360; Manchester St. Ry. v. Barrett, [fol. 80] 265 Fed. 557; Plews v. Burrage, supra; Nat. Aniline & Chemical Co. v. Arnhold, 298 Fed. 755.

Union Pacific Railway v. Harris, 158 U. S. 326, has been cited by some of the lower federal courts as sustaining the case of George v. Tate, but we find nothing in it that indicates that such was the intention of the Supreme Court, and it seems rather significant that no mention of the George case is found in the opinion and that a large number of cases decided in various state Supreme Courts are referred to.

Assuming, but not determining as a matter of law, that the district court correctly held that the release is under seal by adoption, and assuming that the distinction between fraudulent misrepresentations and fraud in the execution of a sealed instrument still exists according to the greater weight of authority, the former as an equitable defense, the latter as a defense at law, we are still of the opinion that the assumptions cannot avail the defendant in this action.

The plaintiff's declarations set up as a cause of action a contract made in violation of the anti-trust laws,—a contract which is declared by a statute to be illegal. Whether plaintiff can establish his claim is of no consequence in the determination of the present issue. Duress is a ground upon which the plaintiff seeks to avoid the consequences of his own act in entering into an illegal agreement.

Conceding that in ordinary cases an instrument executed under duress is voidable not void (Duignan v. U. S., 274 U. S. 195; Robinson & Co. v. Belt, 187 U. S. 41; Southern Cotton Oil Co. v. Shelton, 220 Fed. 247), this cannot be so if the effect would be to give life and substance to an illegal contract.

In the case before us the release alleged to have been signed under duress enters into and forms an integral part of an agreement alleged to be illegal because establishing a monopoly in restraint of interstate trade. If the agreement is void the release is void and requires no court of [fol. 81] equity to so declare it. The primary issue is the validity or invalidity of the contract. A distinction is still made in cases following George v. Tate between instruments void and those voidable. A release obtained by trickery is treated in an action at law as if it were never made. It will admit of a replication or plea of non est factum. So also, a release, even though under seal, is void not voidable when, if given effect, it would result in affirming a contract de-

cleared illegal by statute. As a matter of pleading such a release, filed as an answer in a suit at law, will admit of a replication setting out that the release is void. The principle that invalidity of a sealed contract may be set up as a defense in an action at law is not of modern origin. It dates back to the time of Coke's reports. In Whelpdale's case, found in Coke's Rep. Vol. 3, Page 241, it is held that infancy and duress are defenses in an action at law under a plea of non est factum, while deeds void by act of Parliament require a special plea setting out the grounds of invalidity and ending "and so the said deed is void."

In the case of Maine Northwestern Development Co. v. Northern Commercial Co., 213 Fed. 103, it is held that fraud inducing the execution of a contract which is of such a nature as to render it against public policy or illegal is available as a defense in an action on a contract at law. Judge Neterer says: "It would indeed be a harsh system of jurisprudence that would lend any of its courts to the enforcement of contracts in violation of fiduciary relations. While the distinction between law and equity is studiously preserved in our federal system, that distinction does not go to the extent of compelling one court to enforce agreements which the other would abhor. Both are established to promote the well-being of society and this may not be promoted by encouraging the violation of the most sacred duties known to the law." See Continental Wall Paper Co. v. Voight, 212 U. S. 226, 261.

It is impossible to harmonize the conflicting decisions of the district courts or even those of the circuit courts of ap- [fol. 82] peal. Each seems to follow its own line of decisions.

We hold that the validity of the contract is the primary issue to be tried and that it raises a mixed question of law and fact entitling the plaintiff to a trial by jury. The order transfering the action at law to equity filed November 8, 1932, cannot be sustained.

Only one more question requires attention for a final disposition of the case, insofar as the issues now before us.

After the case had been transferred to equity the plaintiff moved the court to frame issues to be submitted to a jury, and it may be suggested that he thereby waived his right of trial by jury in an action at law.

When a court of equity calls a jury it is only for the purpose of enlightening its conscience and not to control its judgment. Basey v. Gallagher, 20 Wall. 670; Quinby v. Conlan, 104 U. S. 420.

Framing issues for a jury in action in equity does not meet or secure the right to trial by jury as guaranteed by the Seventh Amendment. In the case of Cates v. Allen, 149 U. S. 451, Chief Justice Fuller uses the following language: "As the ascertainment of complainants' demand is by action at law, the fact that the chancery court has the power to summon a jury on occasion cannot be regarded as the equivalent of the right of trial by jury secured by the Seventh Amendment." See also New Jersey Land & Lumber Co. v. Gardener Lacy Lumber Company, 190 Fed. 861, 869.

In view of the fact that the plaintiff immediately filed a bill of exceptions to the order of transfer which was allowed November 9, 1932, and has consistently claimed throughout the course of proceedings in equity that it is entitled to a jury trial, we hold that it has not waived its right by its motion to frame issues to be tried by jury after the case was transferred to equity. See American Surety Company v. American Mills Co., supra; Hollins v. Briarfield Coal & Iron Company, 150 U. S. 371, 380.

[fol. 83] The several orders and decrees of the District Court are vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion; the appellant to have costs in this court.

Morton, J., concurs in the result.

[fols. 84 & 85] IN UNITED STATES CIRCUIT COURT OF APPEALS

MINUTE ENTRY

On October 30, 1934, this cause came on to be heard, and was fully heard by the court, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, and Honorable George F. Morris, District Judge, sitting.

Thereafter, to wit, on the eighth day of April, A. D. 1935, the opinion of the court (page 69) was filed and the following Final Decree was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

FINAL DECREE—April 8, 1935

This cause came on to be heard October 30, 1934, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, April 8, 1935, here ordered, adjudged and decreed as follows: The several orders and decrees of the District Court are vacated and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day; the appellant to have costs in this court.

By the Court:

Arthur I. Charron, Clerk.

RECITAL AS TO ORDERS

Thereafter, to wit, on April 23, 1935, a petition for rehearing was filed by appellee, which was denied by order of court on May 3, 1935.

Thereafter, to wit, on May 9, 1935, mandate was stayed until further order to court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsed on cover:] File No. 39,681. U. S. Circuit Court of Appeals, First Circuit. Term No. 127. Radio Corporation of America, Petitioner, vs. Raytheon Manufacturing Company. Petition for a writ of certiorari and exhibit thereto. Filed June 14, 1935. Term No. 127 O. T. 1935.

FILE COPY

Office Supreme C
FILE
JUN 14
CHARLES ELMOR

In the

Supreme Court of the United States.

October Term, 1935.

No. 127

Radio Corporation of America,
Petitioner,

v.

Raytheon Manufacturing Company,
Respondent.

Petition for a Writ of Certiorari to the Circuit Court of Appeals for the First Circuit and Brief in Support Thereof.

JOHN W. DAVIS,
JOHN L. HALL,
CLAUDE R. BRANCH,
Attorneys for Petitioner.

DAVIS, POLK, WARDWELL, GARDINER & REED,
CHOATE, HALL & STEWART,
Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

SUBJECT INDEX.

	Page
Petition for writ of certiorari	1
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
The parties and the cause of action	3
Statement	4
Specification of errors	8
Reasons for granting the writ	8
Brief in support of petition for writ of certiorari	13
Statement	13
Argument	14
1. The Circuit Court of Appeals has refused to follow the decisions of this Court in *Hartshorn* v. *Day*, 19 How. 211, and *George* v. *Tate*, 102 U.S. 564	14
2. The decision of the Circuit Court of Appeals should be reviewed because the Court's refusal to follow *Hartshorn* v. *Day* and *George* v. *Tate* reflects the existence of a sharp conflict of authority in the lower Federal Courts upon the whole question of avoiding releases, both sealed and unsealed, in actions at law, and also reflects doubts as to whether *Hartshorn* v. *Day* and *George* v. *Tate* are still controlling authorities	16
3. The decision of the Circuit Court should be reviewed because the Court's conclusion that the license contract containing the release is void for illegality is in direct conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Dennehy* v. *McNulta*, 86 Fed. 825, and fails to give effect to principles laid down in decisions of this Court	18

Page

4. The decision of the Circuit Court of Appeals should be reviewed because it raises serious questions as to the validity of any settlement of an anti-trust claim 21
5. Jurisdictional matters 22

TABLE OF AUTHORITIES CITED.

A. B. Small Co. v. Lamborn & Co., 267 U.S. 248 10, 19, 20
Adamos v. New York Life Ins. Co., 293 U.S. 386 18, 23
American Mills Co. v. American Surety Co., 260 U.S. 360 17, 18
Barnette v. Wells Fargo Bank, 270 U.S. 438 15
Cable v. United States Life Ins. Co., 191 U.S. 288 17
Cavender v. Virginia Bridge & Iron Co., 257 Fed. 877 16
Cincinnati Packet Co. v. Bay, 200 U.S. 179 21
Columbia-Knickerbocker Trust Co. v. Abbot, 247 Fed. 833 17
Columbia Pictures Corp. v. Bi-Metallic Inv. Corp., 42 Fed. (2d) 873 9, 19
Connolly v. Union Sewer Pipe Co., 184 U.S. 540 10, 19, 21
Dennehy v. McNulta, 86 Fed. 825; certiorari denied, 176 U.S. 683 9, 18, 19
Enelow v. New York Life Ins. Co., 293 U.S. 379 2, 7, 9, 18, 22
Gasoline Products Co. v. Champlin Refining Co., 46 Fed. (2d) 511 21
George v. Tate, 102 U.S. 564 7, 8, 9, 14, 15, 16, 17, 18
Hartshorn v. Day, 19 How. 211 7, 8, 9, 14, 15, 16, 17, 18
Hoad v. New York Central R.R. Co., 6 Fed. Supp. 565 17, 17n.
Kansas City Southern Ry. Co. v. Martin, 262 Fed. 241 17
Liberty Oil Co. v. Condon Bank, 260 U.S. 235 2, 6n., 22
National Aniline & Chemical Co. v. Arnhold, 298 Fed. 755 18

	Page
Manchester St. Ry. Co. v. Barrett, 265 Fed. 557	17
Pennsylvania R.R. Co. v. Hammond, 7 Fed. (2d) 1010	16
Plews v. Burrage, 19 Fed. (2d) 412	17
Plews v. Burrage, 274 Fed. 881	17
Pringle v. Storrow, 9 Fed. (2d) 464	17
Raytheon Manufacturing Co. v. Radio Corporation of America, 190 N.E. 1	6n., 21
Southern Ry. Co. v. Clark, 233 Fed. 900	17
Steele v. Drummond, 275 U.S. 199	21
Union Pacific Ry. Co. v. Syas, 246 Fed. 561	16
Wilder Mfg. Co. v. Corn Products Co., 236 U.S. 165	10, 19, 21
Willett v. Herrick, 258 Mass. 585	15
Code of Laws of the United States, Title 15, chapter 1, section 15	2
Judicial Code, section 240 (a), as amended by the Act of February 13, 1925	2
Judicial Code, section 274 (b)	2, 3, 6n., 22

In the

Supreme Court of the United States.

October Term, 1935.

No.

RADIO CORPORATION OF AMERICA,
Petitioner,

v.

RAYTHEON MANUFACTURING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honourable the Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named petitioner, pray that a writ of certiorari may issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered April 8, 1935, in the case between the above-named parties docketed therein as No. 2946.

Opinions Below.

No opinions were filed by the District Court with respect to any of the orders relevant to this petition. The opinion of the Circuit Court of Appeals appears at pages 69 to 83 of the Record.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered April 8, 1935 (R. 84). A petition for rehearing was filed in the Circuit Court of Appeals April 23, 1935, and was denied May 3, 1935 (R. 84).

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

The action to which the petition relates is an action at law brought under Title 15 of the Code of Laws of the United States, chapter 1, section 15 (R. 2, 4, 14), to recover damages for alleged violation of the anti-trust laws. The primary question raised before the Circuit Court of Appeals and raised upon this petition is the correctness of an order of the District Court (reversed by the Circuit Court of Appeals) transferring the case to the equity side of the Court for a preliminary hearing, pursuant to the practice established under the decision of this Court in *Liberty Oil Co.* v. *Condon Bank*, 260 U.S. 235. Judicial Code, section 274 (b). The Circuit Court of Appeals took appellate jurisdiction under the decision of this Court in *Enelow* v. *New York Life Ins. Co.*, 293 U.S. 379 (R. 74-75). A further discussion of this aspect of the case appears at pp. 22-24, *infra*.

Questions Presented.

Two questions are presented:

(1) Where a contract under seal containing a release is sought to be set aside and rescinded for alleged duress based upon economic pressure, is the issue of the validity of the contract triable on the law side of the Court, or should it be tried on the equity side?

(2) Where a license contract containing a release of a claim for damages for violation of the anti-trust laws is

otherwise an entirely legal contract, is such a contract shown to be *illegal* solely by reason of the allegation that the contract was executed involuntarily as a result of economic pressure exerted by the possesssor of an illegal monopoly?

Statute Involved.

Section 274 (b) of the Judicial Code provides as follows:

"In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

The Parties and the Cause of Action.

The action is brought against the petitioner, Radio Corporation of America, by Raytheon, Inc., a Massachusetts corporation, under the name of Raytheon Manufacturing Company, which name it had formerly borne (R. 3, 13, 14). The action is alleged to be brought, however, not for the benefit of the nominal plaintiff, but for the exclusive benefit and at the expense of the Raytheon Manufacturing Company (R. 13), a Delaware corporation organized by the respondent in May, 1928 (R. 11, 13, 22). The sole cause of

action in suit is alleged to be a cause of action which accrued to the Massachusetts corporation (the nominal plaintiff) and "wholly existed before May 28, 1928, and before the organization of said Delaware corporation and which said cause of action did on or about May 28, 1928, by understanding and agreement between said two corporations become the property of said Delaware corporation" (R. 13). Any other cause of action is expressly disclaimed (R. 13).

Statement.

The respondent Raytheon Company, on December 14, 1931, brought an action for damages in the sum of $15,000,000 (R. 2) against the petitioner, based on alleged violations of the anti-trust laws. The declaration is in two counts, both substantially similar. The claims under both counts are expressly limited to claims accruing to the Massachusetts Raytheon Company prior to May 28, 1928, on which date it appears that by an oral understanding (R. 36-37) the claims were assigned in beneficial interest to the Delaware Raytheon corporation (Disclaimer, R. 13; Declaration, count II, §44, R. 23).

The petitioner, in its answer (R. 29), set up among other defenses a release under seal executed by the respondent. This release was incorporated in a license contract and supplemental agreement, dated March 19, 1929 (R. 43-56), under which the petitioner licensed Raytheon Manufacturing Company (of Delaware) to manufacture and sell radio tubes under patents controlled by petitioner.

It is not questioned that the release covered the cause of action sued upon, and the fact of its execution is admitted.

The respondent, however, by anticipatory pleading in its declaration, attacked the validity of the release on the ground that the contract had been executed involuntarily. The invalidity of the contract was alleged to arise from the

fact that the petitioner had perfected a patent monopoly whereby the petitioner exercised an "illegal duress" upon the whole radio industry, that the respondent's business as a manufacturer of radio tubes had been destroyed by May, 1928, as a result of such control of the industry by the petitioner, and that as a result the Raytheon Companies were driven, in 1929, to seek and accept a license contract from the petitioner, which contract contained the release in question (R. 6-11; 17-22). The specific allegations attacking the validity of the release, appearing in identical language in paragraphs 35, 36 and 37 of both counts of the declaration (R. 11, 21-22), are as follows:

> "35. Wholly because of this destruction and of the illegal duress aforesaid which the defendant had imposed as aforesaid on this industry and this interstate and foreign commerce, the plaintiff and its Delaware corporation were compelled to seek and accept a license from the defendant.
>
> "36. With knowledge of this compulsion and relying on its effectiveness, the defendant exercised its illegally acquired power as aforesaid to compel the plaintiff and its said Delaware corporation to execute a purported release of claims against the defendant.
>
> "37. The illegal duress aforesaid by the defendant rendered said release void and the plaintiff has never executed a valid release of said claim."

In this posture of the pleadings, the petitioner made a motion for a transfer of the cause to the equity side of the Court for a preliminary hearing on the issue raised by the respondent as to the validity of the release (R. 30). The grounds of the motion in substance were that the execution of the release was admitted; that the release was under the respondent's seal by adoption; and that, being under seal, the

contract could not be set aside for duress except in equity, wherefore the issue should be tried in equity* (R. 30).

After a hearing, at which the release contract itself was introduced in evidence and inspected by the Court, but no other evidence was taken (R. 42), the motion for transfer was granted on November 8, 1932 (R. 31). The respondent excepted (R. 31, 42). No question was raised by the respondent as to the fact that the release was under the respondent's seal by adoption (see R. 77-78).

By amendment to its answer, the petitioner set up that the Raytheon Companies for more than two years since the execution of the license contract, and up to the time of the bringing of the action, had accepted and affirmed the contract which is sought herein to be repudiated, and, in particular, that the Delaware Raytheon Company, for whose sole benefit the present action is brought, had brought suit in the Massachusetts Courts to enforce the contract and to enjoin the petitioner from terminating it† (R. 32, 35).

After subsequent proceedings, including the denial of a motion by the respondent for jury issues in equity (R. 32, 37) and the denial of a further motion by the respondent to rescind the order of transfer (R. 37-39), the *respondent itself* moved for the entry of a final decree in equity (R. 39-40), and on February 19, 1934, a final decree was entered affirming the validity of the release and transferring the case back to the law side for further proceedings (R. 40-42). From this decree the respondent appealed (R. 42).

---

*The petitioner took the position that the respondent's anticipatory replication attacking the validity of the release set up an equitable defense (Judicial Code, section 274 (b)) to the release contract pleaded by the petitioner, or, in the alternative, that this anticipatory replication was properly equivalent to an equitable prayer for cancellation of the release, and that the proper practice required that the case be transferred to equity for a preliminary hearing on this issue. *Liberty Oil Co.* v. *Condon Bank*, 260 U.S. 235. The District Court so ruled.

†This case is reported in *Raytheon Manufacturing Co.* v. *Radio Corporation of America*, 190 N.E. 1. Pursuant to this decision, the Raytheon Company was granted an injunction, still in force, which enjoins the Radio Corporation from terminating the very contract now claimed to be illegal and void.

The Circuit Court of Appeals entertained the appeal under the decision of this Court in *Enelow* v. *New York Life Insurance Co.*, 293 U.S. 379 (R. 74), and vacated the orders and decrees of the District Court (R. 84). The Court held, in the first place, that the correctness or incorrectness of the proceedings in the District Court depended upon the correctness of the original order of transfer to equity. If that order was correct, no error was found in the subsequent proceedings (R. 75). The Court held, however, that the transfer was wrong because the issue raised as to the validity of the release was legal and not equitable. This conclusion appears from the opinion of the Court to have been based upon the following considerations:

(*a*) The Court expressed great doubt as to whether the decisions of this Court in *Hartshorn* v. *Day*, 19 How. 211, and *George* v. *Tate*, 102 U.S. 564, were still controlling (R. 78-80). It was held in those cases that, where a contract under seal was attacked for invalidity which rendered the contract voidable rather than void, the issue, not being available under the legal plea of *non est factum*, was triable only in equity. The refusal of the Circuit Court of Appeals to follow those decisions appears to have been based partly upon a reluctance to recognize any substantial distinction between sealed instruments and unsealed instruments (R. 79) and partly upon the conclusion that those cases had in effect been discredited by subsequent decisions of this Court (R. 79-80).

(*b*) The Court recognized the existence of an irreconcilable conflict in the decisions in the lower Federal Courts upon the whole question of setting aside releases, both sealed and unsealed, in actions at law (R. 81-82).

(*c*) The Court took the view that the license contract containing the release was not merely voidable for duress, but was *void for illegality* (R. 80-82). The opinion is not clear as to whether the Court felt that the type of duress

described in the declaration imported illegality into the contract itself, or whether the Court felt that the contract was illegal because it related to patents with respect to which the defendant was alleged to have a monopoly (compare R. 80, last paragraph; R. 81).

Specification of Errors.

The Circuit Court of Appeals erred—

(1) In refusing to follow the decisions of this Court in *Hartshorn* v. *Day*, 19 How. 211, and *George* v. *Tate*, 102 U.S. 564.

(2) In holding that a contract under seal can be avoided or rescinded for economic duress on the law side of the Court.

(3) In holding that the license contract containing the release was an *illegal* agreement and accordingly *void*.

(4) In reversing the order of the District Court for transfer of the case to equity for a preliminary hearing upon the issue of the validity of the release.

Reasons for Granting the Writ.

(1) The Circuit Court of Appeals refused to follow the decisions of this Court in *Hartshorn* v. *Day*, 19 How. 211, and *George* v. *Tate*, 102 U.S. 564, not apparently on the basis of any factual distinction between those cases and the present, but because the Court felt that the principles laid down by those decisions were no longer controlling. The Court stated (R. 79-80):

> "While it may not appear that the case of *George* v. *Tate*, has been expressly overruled it appears to have been questioned and sometimes disregarded. *Am. Mills Co.* v. *Am. Surety Co.*, 260 U.S. 360, *Manchester St. Ry.* v. *Barrett*, 265 Fed. 557, *Plews* v. *Burrage*, supra, *National Aniline & Chemical Co.* v. *Arnhold*, 298 Fed. 755."

We submit that a decision of this Court is necessary to settle the question whether the decisions of this Court in *Hartshorn* v. *Day* and *George* v. *Tate* are still controlling authorities with respect to the setting aside of sealed instruments, as distinguished from unsealed instruments. Cf. *Enelow* v. *New York Life Insurance Co.*, 293 U.S. 379.

(2) The Circuit Court of Appeals expressly recognized the existence of an irreconcilable conflict of authority in the lower Federal Courts as to the whole question of setting aside releases, both sealed and unsealed, in actions at law. As the Court said (R. 81-82):

> "It is impossible to harmonize the conflicting decisions of the district courts or even those of the circuit courts of appeal. Each seems to follow its own line of decisions."

(For discussion of the cases, see pp. 16-18, *infra*).

The question of the proper mode of setting aside releases in actions at law is one of recurring importance. We submit that an authoritative decision of this Court is necessary to settle this question.

(3) The decision of the Circuit Court of Appeals that the license contract containing the release is *void* as constituting an *illegal* agreement appears to be directly in conflict with other decisions. If the Court be taken to have held that the contract was rendered illegal because it was alleged to have been executed under the economic necessity of dealing with the possessor of an illegal monopoly, the decision is directly in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in—

> *Dennehy* v. *McNulta*, 86 Fed. 825; certiorari denied, 176 U.S. 683.

See also *Columbia Pictures Corp.* v. *Bi-Metallic Inv. Corp.* (D.C.), 42 Fed. (2d) 873.

On the other hand, if the Court be taken to have held that, notwithstanding the complete absence of any allegation that the contract contained any illegal or improper terms or that the contract formed an inherent part of the petitioner's alleged plan or conspiracy in restraint of trade,* the contract was nevertheless illegal because it related to patents with respect to which the petitioner was alleged to have an illegal monopoly, such determination is in conflict with decisions of this Court in the following cases:

A. B. Small Co. v. *Lamborn & Co.*, 267 U.S. 248.
Wilder Mfg. Co. v. *Corn Products Co.*, 236 U.S. 165.
Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540.

Those cases hold that a contract cannot be set aside as *illegal* where the contract is merely collateral to the existence of a monopoly, but the illegality must be shown to be *inherent* in the contract. In the absence of any such showing in the present case, we submit that the decision of the Circuit Court of Appeals is erroneous, and, being in con-

*The license contract in question cannot be taken, even by inference, to have formed any part of the monopoly and conspiracy upon which the plaintiff's principal cause of action is based in view of the fact that the cause of action is expressly alleged to have become complete before May 28, 1928 (Disclaimer, R. 13; Declaration, count II, §44, R. 23), whereas the release was not executed until almost a year later, viz., March 19, 1929 (R. 43). It should also be noted that the license contract in question here, which is a license for the manufacture of radio *tubes*, is entirely distinct from the earlier license contracts alleged in the declaration to have been issued in 1927 to manufacturers of *radio sets* as a step in the creation of the defendant's alleged monopoly (Declaration, count I, §§ 19-27, R. 7-9; Declaration, count II, §§ 19-27, R. 18-19). The so-called "tying clause" designated as "clause 9" contained in certain of these *set* licenses issued in 1927, which related to the purchase by the licensee of tubes for installation in the sets manufactured by him, has no counterpart in the license issued in 1929 to the plaintiff, which was not a *set* license but a *tube* license. Furthermore, the so-called "clause 9" had been discontinued even with respect to set licenses before the execution of the present contract (see R. 54-55).

flict with the cases above cited upon an important point of Federal law, it should be reviewed by this Court.

(4) The decision of the Circuit Court of Appeals with respect to the *illegality* of the contract containing the release should also be reviewed, we submit, because of its practical effect in throwing doubt upon the validity of all settlements of anti-trust claims. If, as the Circuit Court of Appeals has held, a party who has had the full benefit of his contract, and has even brought suit to enforce it, may thereafter repudiate it for illegality upon the bare plea that the defendant was the possessor of a monopoly and that economic necessity compelled the plaintiff to execute the contract in the first instance, it is difficult to see how any agreement for settlement of an anti-trust claim can be of any practical protection to a defendant. The question raised presents practical considerations of great importance with respect to the effect of the anti-trust laws.

Wherefore it is respectfully submitted that the petition should be granted.

JOHN W. DAVIS,
JOHN L. HALL,
CLAUDE R. BRANCH,
Attorneys for Petitioner.

DAVIS, POLK, WARDWELL, GARDINER & REED,
CHOATE, HALL & STEWART,
Of Counsel.

Dated, Boston, Massachusetts,
June 14, 1935.

In the

Supreme Court of the United States.

October Term, 1935.

No.

RADIO CORPORATION OF AMERICA,

Petitioner,

v.

RAYTHEON MANUFACTURING COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

The facts, the questions presented, and the specification of errors are set out in the petition.

The decision of the Circuit Court of Appeals, as appears from its opinion, was based entirely upon the conclusion that the District Court erred in making the original order for a transfer of the case to equity for preliminary hearing on the validity of the release. In the opinion of the Circuit Court of Appeals, if the original order of transfer was correct, no error appeared in the subsequent proceedings (R. 75). The questions presented on this petition, therefore, relate exclusively to the issue raised by the motion for transfer, *i.e.*, Was the issue raised by the respondent as to the validity of the release under seal set up by the petitioner triable at law or in equity?

Argument.

1. The Circuit Court of Appeals has refused to follow the decisions of this Court in Hartshorn v. Day, 19 How. 211, and George v. Tate, 102 U.S. 564.

In holding that the order of transfer to equity was wrong, the Circuit Court of Appeals refused to follow two decisions of this Court:

Hartshorn v. *Day*, 19 How. 211.
George v. *Tate*, 102 U.S. 564.

Those decisions held that a contract under seal cannot be avoided in an action at law except for a defect going to the *execution* of the instrument. It was decided in those cases that fraud in the *inducement* of a contract, which renders the contract not void but merely voidable, could not be set up against a sealed instrument except in equity. As stated in *Hartshorn* v. *Day* (19 How. 211, 222-223):

> "The general rule is, that in an action upon a sealed instrument in a court of law, failure of consideration, or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between parties and privies to the deed; and, more especially, where there has been a part execution of the contract. The difficulties are in adjusting the rights and equities of the parties in a court of law; and hence, in the States where the two systems of jurisprudence prevail, of equity and the common law, a court of law refuses to open the question of fraud in the consideration, or in the transaction out of which the consideration arises, in a suit upon the sealed instrument, but turns the party over to a court of equity, where the instrument can be set aside upon such terms as, under all the circumstances, may be equitable and just between the parties.

A court of law can hold no middle course; the question is limited to the validity or invalidity of the deed.

"Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence."

It will be seen that two distinctions are implicit in these decisions: (*a*) a distinction between sealed instruments and contracts not under seal, and (*b*) a distinction between a defect which renders an instrument *voidable* and thus subject to rescission or cancellation on equitable principles, and a defect which renders an instrument wholly *void*. Where an instrument under seal is attacked on a ground which renders the instrument *voidable* merely, these two decisions hold that the issue is triable only in equity.

It was apparently conceded by the Circuit Court of Appeals that these decisions, if controlling, would apply to a case involving duress as well as to a case involving fraud (see R. 77), it being well settled that duress falling short of actual physical compulsion renders a contract voidable and subject to rescission, but not void.

Barnette v. *Wells Fargo Bank,* 270 U.S. 438, 444.
Willett v. *Herrick,* 258 Mass. 585, 603.

The Court nevertheless refused to follow *Hartshorn* v. *Day* and *George* v. *Tate,* apparently for two reasons:

(*a*) The Court recognized the existence of a sharp conflict of authority in the lower Federal Courts on the whole question of avoiding releases, both sealed and unsealed, in actions at law, reflecting a serious doubt on the part of

some of those Courts as to whether *Hartshorn* v. *Day* and *George* v. *Tate* are still controlling authorities (R. 78-80).

(*b*) The Court concluded that, under the circumstances disclosed in this case, the contract containing the release was not merely charged to be voidable for duress, but was charged to be *void by reason of illegality* (R. 80-82).

The petitioner submits that both matters present issues which should be reviewed by this Court.

2. The decision of the Circuit Court of Appeals should be reviewed because the Court's refusal to follow Hartshorn v. Day and George v. Tate reflects the existence of a sharp conflict of authority in the lower Federal Courts upon the whole question of avoiding releases, both sealed and unsealed, in actions at law, and also reflects doubts as to whether Hartshorn v. Day and George v. Tate are still controlling authorities.

The question as to the propriety of avoiding releases, both sealed and unsealed, in actions at law is a matter of recurring importance upon which the decisions of the Circuit Courts of Appeals, as well as the District Courts, are in irreconcilable conflict. This conflict of authority was recognized by the Circuit Court of Appeals. The Court said (R. 81-82): "It is impossible to harmonize the conflicting decisions of the district courts or even those of the circuit courts of appeal. Each seems to follow its own line of decisions." Cases holding that the matter is of equitable cognizance include:

Union Pacific Ry. Co. v. *Syas* (C.C.A. 8), 246 Fed. 561.

Pennsylvania R.R. Co. v. *Hammond* (C.C.A. 2), 7 Fed. (2d) 1010, 1015, 1016.

Cavender v. *Virginia Bridge & Iron Co.* (D.C.), 257 Fed. 877.

Cases reaching a contrary result include:

Kansas City Southern Ry. Co. v. *Martin* (C.C.A. 5), 262 Fed. 241.

Manchester St. Ry. Co. v. *Barrett* (C.C.A. 1), 265 Fed. 557.

Plews v. *Burrage* (C.C.A. 1), 274 Fed. 881.

But see *Plews* v. *Burrage* (D.C.), 19 Fed. (2d) 412, 413.

An extensive and valuable discussion of the authorities, especially with respect to instruments under seal, is found in the opinion of the late Judge Lowell in—

Pringle v. *Storrow* (D.C. Mass.), 9 Fed. (2d) 464.

See also *Southern Ry. Co.* v. *Clark* (C.C.A. 6), 233 Fed. 900, 905-906.

Columbia-Knickerbocker Trust Co. v. *Abbot* (C.C.A. 1), 247 Fed. 833, 837.

A recent opinion discussing the conflict of authorities is—

Hoad v. *New York Central R.R. Co.* (D.C.), 6 Fed. Supp. 565.*

Particularly significant in connection with the present case is the view expressed by some Courts that the distinction between sealed instruments and unsealed contracts is no longer controlling, and that therefore *Hartshorn* v. *Day* and *George* v. *Tate* must be taken to have been in effect overruled by subsequent decisions of this Court in which no question of a seal was raised, such as *Cable* v. *United States Life Ins. Co.*, 191 U.S. 288, and *American Mills Co.*

*Counsel are informed by the West Publishing Company that the order in the *Hoad* case was "motion denied." The order "motion granted," as reported, is incorrect, as appears from the opinion itself.

v. *American Surety Co.*, 260 U.S. 360. This view is suggested by Judge Learned Hand in—

National Aniline & Chemical Co. v. *Arnhold* (D.C.), 298 Fed. 755.

This view, which was apparently shared by the Court in this case (R. 79-80), necessarily suggests the further question whether the recent decisions of this Court in *Enelow* v. *New York Life Ins. Co.*, 293 U.S. 379, and *Adamos* v. *New York Life Ins. Co.*, 293 U.S. 386, wherein this Court reaffirmed the *Cable* case and the *American Mills Co.* case, apply also to releases or contracts under seal, or whether *Hartshorn* v. *Day* and *George* v. *Tate* limit those decisions.

The petitioner submits that a decision of this Court is necessary to settle the conflict existing in the decisions of the lower Federal Courts, and to settle the important question whether the decisions of this Court in *Hartshorn* v. *Day* and *George* v. *Tate* are still to be regarded as controlling authorities.

3. The decision of the Circuit Court should be reviewed because the Court's conclusion that the license contract containing the release is void for illegality is in direct conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in Dennehy v. McNulta, 86 Fed. 825, and fails to give effect to principles laid down in decisions of this Court.

In *Dennehy* v. *McNulta*, 86 Fed. 825, the plaintiff sought to avoid a contract made by him with a party to an alleged conspiracy in restraint of trade on the ground that the contract had been made involuntarily under the economic necessity of dealing with the defendant. The Circuit Court of Appeals for the Seventh Circuit held that this charge did not render the contract illegal, saying (86 Fed. 825, 827):

". . . The mere fact that the corporation, as one of the contracting parties, may constitute an unjust monopoly, and that its general business is illegal . . . cannot serve, ipso facto, to create default or liability on its contracts generally; nor can such fact be invoked collaterally to affect in any manner its independent contract obligations or rights."

Certiorari was denied, 176 U.S. 683.

Accord: *Columbia Pictures Corp.* v. *Bi-Metallic Inv. Co.* (D.C.), 42 Fed. (2d) 873.

In the present case the respondent's attack on the release, as contained in paragraphs 35 to 37, inclusive, of each count of the declaration (set out at p. 5, *supra*), is based entirely on the allegation that the license contract containing the release was executed involuntarily as a result of economic pressure exerted by the petitioner by virtue of its allegedly illegal and monopolistic position in the industry. The petitioner submits that the issue raised is exactly the same as that raised in *Dennehy* v. *McNulta, supra,* and that the decision of the Court in this case holding the contract to be *illegal* and void is in direct conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in that case.

It has been held on several occasions by this Court that a contract cannot be held to be *illegal* merely because one of the parties to it is also a party to an illegal combination in restraint of trade. In order to show *illegality* in such a contract it must be shown that the illegality relied on is *inherent* in the particular contract in question.

A. B. Small Co. v. *Lamborn & Co.*, 267 U.S. 248.
Wilder Mfg. Co. v. *Corn Products Co.*, 236 U.S. 165.
Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540.

In *A. B. Small Co.* v. *Lamborn & Co.*, for example, Lamborn & Company sued the A. B. Small Company for breach of a contract for the sale of sugar. In defense, the purchaser set up that the seller was a member of an illegal combination in restraint of interstate trade in refined sugar and that "the seller conformed the terms of sale to standards sanctioned by the combination" (267 U.S. 248, 252). A demurrer to this defense was sustained, the Court holding that it failed to establish any illegality in the contract. The Court said (267 U.S. 248, 252):

> "As has been pointed out in prior cases, there is nothing in the Anti-Trust Act which invalidates such a collateral contract or relieves the buyer from his obligation under it. . . . It is only where the invalidity is inherent in the contract that the Act may be interposed as a defense."

In the present case the petitioner submits that the Circuit Court of Appeals has entirely failed to give effect to the principles thus laid down by this Court. Beyond the allegations relating to the manner of the execution of the contract,* there are no allegations whatever showing or purporting to show that the contract itself was an illegal agreement. There is no suggestion that any of the terms of the contract were illegal or improper, or that the license contract was not entirely collateral to the underlying patent monopoly described in earlier portions of the declaration in exactly the same way and to the same extent as the contracts for the sale of property in *A. B. Small Co.* v. *Lamborn &*

*The allegation that the contract was obtained by "illegal duress" is obviously not an allegation that the contract is illegal. It is merely an allegation that the duress was illegal, as duress generally is. Fraud likewise is illegal, but an allegation that a contract was obtained by "illegal fraud" would not amount to an allegation that the contract itself was illegal.

Co. and the *Wilder Manufacturing Co.* case and the *Connolly* case.

See *Gasoline Products Co.* v. *Champlin Refining Co.* (D.C. Me.), 46 Fed. (2d) 511.

It is also significant in this connection that the respondent has enjoyed the full benefit of the license contract which it now seeks to repudiate. As shown in the petitioner's amended answer, the respondent's affiliated Delaware corporation (for whose sole benefit the present action is brought, R. 13) has even brought suit against the petitioner in the Massachusetts Courts to enforce the license (R. 34-35). The final decision of the Supreme Judicial Court of Massachusetts enjoining the petitioner from terminating this contract is reported in *Raytheon Manufacturing Co.* v. *Radio Corporation of America,* 190 N.E. 1. It has been held by this Court that, where a party has obtained and received the full benefit of a contract, it is against the policy of the law to allow him thereafter to escape his obligations under the contract on the plea that the agreement is illegal, except upon a clear and explicit showing of such illegality.

Steele v. *Drummond,* 275 U.S. 199, 205.
Cincinnati Packet Co. v. *Bay,* 200 U.S. 179, 185.

The petitioner submits that the decision of the Circuit Court of Appeals in this case is in conflict with this principle.

4. The decision of the Circuit Court of Appeals should be reviewed because it raises serious questions as to the validity of any settlement of an anti-trust claim.

The Circuit Court of Appeals has held that, if the respondent succeeds in establishing its original cause of action and shows that the petitioner has violated the anti-trust laws, the same proof will also serve to show that the respon-

dent's subsequent release of this cause of action is illegal and void.

Under this decision it would appear that an anti-trust plaintiff has only to establish his original cause of action in order to invalidate as illegal any subsequent release of that cause of action, with the result that such a release is of no practical effect whatever. It presents no bar to the plaintiff's action and affords the defendant no more protection than if it had never been signed. Such a result, besides being, as the petitioner submits, in conflict with decisions of this Court and decisions of the lower Federal Courts, necessarily throws grave doubt upon the validity and effectiveness of all past settlements of anti-trust claims. The petitioner submits that the practical aspects of the matter are so serious as to warrant a review of the decision by this Court.

5. Jurisdictional Matters.

The order of the District Court transferring the case to equity for preliminary hearing on the validity of the release was granted under section 274 (b) of the Judicial Code relating to the raising of equitable defenses in actions at law by answer, plea or replication. Where an equitable issue is thus raised in an action at law, the proper practice under this section is to transfer the case to the equity side for hearing upon the equitable issue.

Liberty Oil Co. v. *Condon Bank*, 260 U.S. 235.

It was held by this Court in *Enelow* v. *New York Life Ins. Co.*, 293 U.S. 379, that such an order for a transfer to equity under section 274 (b) is appealable, even where interlocutory; and certiorari was granted in that case to review the decision of the Circuit Court of Appeals upon such order.

The petitioner submits that the present case is in better posture for review than the *Enelow* case because in this case

the proceedings in equity have been carried through to a final decree in equity affirming the validity of the release.

Cf. *Adamos* v. *New York Life Ins. Co.*, 293 U.S. 386.

If the release is sustained, it is obvious that the respondent's claim for damages to the extent of $15,000,000 will be ended.

The respondent has taken the position, however, and may urge here, that even if the release be sustained, the respondent will nevertheless be entitled to recover to the limited extent of $1;500,000 by virtue of a modifying agreement executed between the parties as a supplement to the original license contract (R. 11-12; 22-23). This modifying agreement appears at record pages 54 to 56. If the Court should deem this question material here, we wish to point out two defects in the respondent's position as to the effect of the modifying agreement. In the first place, it is apparent upon the face of the contract that the plaintiff here, being the Massachusetts corporation whose correct name is Raytheon, Inc. (R. 2, 3, 13, 14; see also pp. 3-4, *supra*), executed a general and unlimited release, without any modification whatever (R. 55-56). The only limitation contained in the supplemental agreement is with respect to the release executed by the *licensee, i.e.,* the Delaware corporation, to whom alone was a license granted (R. 43, 54, 55). It is thereby provided that, on certain contingencies, the "Licensee shall become entitled to assert its claim for . . . damages . . ." (R. 55). In the present case the respondent is not the licensee, and, therefore, cannot claim that any limitation was made with respect to its own general release. Furthermore, the claim here asserted is not a claim for damages suffered by the licensee, but is exclusively a claim for damages suffered by the respondent itself (R. 13). Since the claim sued on is clearly the respondent's own claim, it is therefore covered by

the respondent's own unlimited release. It seems obvious that the respondent cannot avoid the effect of its general release by the device of a mere oral understanding (R. 36-37) with the licensee that the respondent should prosecute its claim for the benefit of the licensee.

In the second place, the modifying agreement does not provide for the payment of any damages in any event, but only for recognition of them by granting a *credit to the licensee against royalty payments due from the licensee under the license* (R. 55). Since the right to such a credit belongs to the licensee, and not the respondent, it seems obvious that the respondent cannot in any event recover anything thereunder either for its own benefit or as the assumed representative of the licensee.

We submit, therefore, that the issues raised upon this petition are properly brought before this Court for review at this time.

Respectfully submitted,

JOHN W. DAVIS,
JOHN L. HALL,
CLAUDE R. BRANCH,
Attorneys for Petitioner.

DAVIS, POLK, WARDWELL, GARDINER & REED,
CHOATE, HALL & STEWART,
Of Counsel.

Dated, Boston, Massachusetts,
June 14, 1935.

FILE COPY

Office Supreme Court,
FILED
NOV 21 1935
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

October Term, 1935.

No. 127.

Radio Corporation of America,

Petitioner,

v.

Raytheon Manufacturing Company,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR PETITIONER.

JOHN W. DAVIS,
JOHN L. HALL,
MANTON DAVIS,
CLAUDE R. BRANCH,
Attorneys for Petitioner.

DAVIS, POLK, WARDWELL, GARDINER & REED,
CHOATE, HALL & STEWART,
Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

INDEX.

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement of the case	3
Specification of errors	8
Preliminary analysis and summary of argument	9
Argument	10
I. No issue as to the legality of the contract is raised on the allegations of the pleadings. The issue raised is merely one of respondent's right to rescind the contract for alleged duress	10
(a) The question whether the facts alleged by the respondent are sufficient to raise any question of the legality of the contract, as distinguished from a question of its voidability, is one of practical importance apart from the question of whether the issue is triable at law or in equity	10
(b) The only element of illegality set forth in the respondent's pleadings is entirely dehors the contract	12
(c) Illegality existing dehors the contract and affecting only the motive for its execution may render the contract voidable, but does not render it absolutely void	14
(d) The determination of the Circuit Court of Appeals that the contract was an illegal agreement is based upon a misconception of the facts alleged in the pleadings	22
(e) Summary	25

Page

II. An issue as to the rescission of an instrument under seal, especially where the contract has been executed, is triable in equity. The District Court properly ordered that the case be transferred to equity for preliminary hearing 26

(a) Under the decisions of this Court in Hartshorn v. Day, 19 How. 211, and George v. Tate, 102 U.S. 564, a sealed instrument may be rescinded only in equity 26

(b) Rescission of the present contract presents questions of laches, ratification, change of position and balancing of equities generally, which cannot be dealt with appropriately, except in equity 35

(c) The order for transfer was proper 38

(d) No error appears in the subsequent proceedings 40

Conclusion 42

TABLE OF AUTHORITIES CITED.

A. B. Small Co. v. Lamborn & Co., 267 U.S. 248 17, 18

Adamos v. New York Life Ins. Co., 293 U.S. 386 31

American Mills Co. v. American Surety Co., 260 U.S. 360 32

American Shipbuilding Co. v. Commonwealth S.S. Co., 215 Fed. 296 37

Atlee v. Backhouse, 3 M. & W. 633 29

Barnette v. Wells Fargo Bank, 270 U.S. 438 11, 14, 29

Bennett v. Butterworth, 11 How. 669 30

Brown v. Pierce, 7 Wall. 205 29

Cable v. U.S. Life Ins. Co., 191 U.S. 288 31, 33

Cammack v. Slattery & Bro. Inc., 241 N.Y. 39, 148 N.E. 781 27n.

Page

Chamberlain Machine Works v. United States, 270 U.S. 347 13n.
Cincinnati Packet Co. v. Bay, 200 U.S. 179 20
Columbia-Knickerbocker Trust Co. v. Abbott, 247 Fed. 833 31
Columbia Pictures Corp. v. Bi-Metallic Inv. Co., 42 F. (2d) 873 16n.
Connolly v. Bouck, 174 Fed. 312; certiorari denied, 220 U.S. 610 11, 14
Connolly v. Union Sewer Pipe Co., 184 U.S. 540 17
Continental Wall Paper Co. v. Voight, 212 U.S. 227 20, 21
Cook v. Fidelity & Deposit Company of Md., 167 Fed. 95 36
Dennehy v. McNulta, 86 Fed. 825; certiorari denied, 176 U.S. 683 16
Dunn v. Prudential Ins. Co. of America, 8 Fed. Supp. 799 32
Earl of Chesterfield v. Janssen, 1 Atk. 301 29
Enelow v. New York Life Insurance Co., 293 U.S. 379 7, 31, 39n.
Fairbanks v. Snow, 145 Mass. 153 11n., 28
Fay v. Hill, 249 Fed. 415 37
Fenn v. Holme, 21 How. 481 30
Fox Film Corporation v. Muller, No. 47, October Term, 1935 15n.
Friend v. Pettingill, 116 Mass. 515 27n.
Gasoline Products Co. v. Champlin Ref. Co., 46 F. (2d) 511 19
George v. Tate, 102 U.S. 564 7, 8, 11n., 25, 26, 28, 30, 31, 33, 34
Hartshorn v. Day, 19 How. 211 7, 8, 11n., 25, 26, 28, 30, 31, 32, 33, 34, 36
Hartsville Mill v. United States, 271 U.S. 43 33n.
Hogg v. Maxwell, 218 Fed. 356 28, 31

	Page
Insurance Co. v. Bailey, 13 Wall. 616	31, 33
Keatley v. U.S. Trust Co., 249 Fed. 296; certiorari granted, 247 U.S. 511; withdrawn, 254 U.S. 658	28, 39n.
Lamplugh v. Cox, Dick. 411	29
Levi v. Mathews, 145 Fed. 152	36
Liberty Oil Co. v. Condon National Bank, 260 U.S. 235	2, 6n., 10, 30, 31, 35, 39, 39n., 40
Lindsay v. First Nat'l Bank of Shreveport, 156 U.S. 485	30
Massachusetts Protective Assn. v. Kittles, 2 F. (2d) 211	28, 32
Miller v. Pyrites Co., 71 F. (2d) 804; certiorari denied, 293 U.S. 604	40
Murphy v. People's Equitable Mutual Fire Ins. Co., 7 Allen, 239	27n.
Nat'l Aniline & Chemical Co. v. Arnhold, 298 Fed. 755	32
O. & W. Thum Co. v. Dickinson, 245 Fed. 609; certiorari denied, 246 U.S. 664	19
Pacific Mails S.S. Co. v. Lucas, 258 U.S. 266	33n.
Pacific Mutual Life Ins. Co. v. Webb, 157 Fed. 155	36
Paramount Famous Lasky Corp. v. United States, 282 U.S. 30	15n.
Pringle v. Storrow, 9 F. (2d) 464	28, 33
Radio Corporation of America v. Hygrade Sylvania Corp., 10 Fed. Supp. 879	20
Raytheon Manufacturing Co. v. Radio Corporation of America, 286 Mass. 84, 190 N.E. 1	7n., 11, 37
Ritchie v. McMullen, 159 U.S. 235	13n.
Schnaubert v. Tippett, 29 F. (2d) 230	40
Skinkle v. Lehigh Valley R. Co., 3 Fed. Supp. 326	34
Snyder v. Rosenbaum, 215 U.S. 261	33n.
Stamey v. United States, 37 F. (2d) 188	39n.
Standard Portland Cement Co. v. Evans, 205 Fed. 1	37
Steele v. Drummond, 275 U.S. 199	20

Page

Sumner v. Ferryman, 11 Mod. 201 29
Thompson v. Central Ohio R. Co., 6 Wall. 134 30
Union Pacific R.R. v. Syas, 246 Fed. 561 31, 37, 39, 39n., 41
Union Pacific R.R. Co. v. Whitney, 198 Fed. 784 39
United States v. Paramount Famous Lasky Corp., 34 F. (2d) 984 15n.
Vere Essex, Earl of Ardglasse, v. Muschamp, 1 Vern. 237 29
Virtue v. Creamery Package Mfg. Co., 179 Fed. 115; affirmed, 227 U.S. 8 19
Wagner v. National Life Ins. Co., 90 Fed. 395 34, 35
Whitcomb v. Schultz, 223 Fed. 268; certiorari denied, 238 U.S. 632 28, 38
Whitney Co. v. Johnson, 14 F. (2d) 24; certiorari denied, 273 U.S. 734 39
Wilder Mfg. Co. v. Corn Products Co., 236 U.S. 165 17, 18, 20
Willett v. Herrick, 258 Mass. 585 14, 29
Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 15n.

Judicial Code, sec. 240 (a), as amended by the Act of Feb. 13, 1925 2
Judicial Code, sec. 274 (a) 35
Judicial Code, sec. 274 (b) 2, 3, 6n., 30, 31, 35, 38, 39
Mass. General Laws (Ter. Ed.) c. 231, sec. 34 27n.
Sheppard's Touchstone, 61 29
U.S. Code, Title 48, sec. 1464 33n.
U.S. Code of Laws, Title 15, c. 1, sec. 15 2
U.S. Constitution, art. III, sec. 2 30
U.S. Constitution, Seventh Amendment 31

Supreme Court of the United States.

OCTOBER TERM, 1935.

No. 127.

RADIO CORPORATION OF AMERICA, PETITIONER,

v.

RAYTHEON MANUFACTURING COMPANY,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

No opinions were filed by the District Court. The opinion of the Circuit Court of Appeals, which appears at pages 64-76 of the record, is reported in 76 F. (2d) 943.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered April 8, 1935 (R. 77). A petition for rehearing was filed in the Circuit Court of Appeals on April 23, 1935, by the petitioner and was denied May 3, 1935 (R. 77).

The petition for a writ of certiorari was filed in this Court on June 14, 1935, and was granted October 14, 1935 (R. 77).

Jurisdiction is conferred upon this Court by section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

The case was begun as an action at law in the District Court for the District of Massachusetts under Title 15 of the Code of Laws of the United States, chapter 1, section 15 (R. 2, 3, 14), to recover damages for alleged violation of the anti-trust laws. The primary question raised before the Circuit Court of Appeals and raised upon this petition is the correctness of an order of the District Court (reversed by the Circuit Court of Appeals) transferring the case to the equity side of the court for a preliminary hearing on the right of the respondent to avoid its sealed release of the cause of action on grounds of duress. *Liberty Oil Co.* v. *Condon National Bank,* 260 U.S. 235. Judicial Code, section 274 (b).

Questions Presented.

Two questions are presented:

(1) Where a contract under seal containing a release is sought to be set aside and rescinded for alleged duress based upon economic pressure, is the issue of the validity of the contract triable on the law side of the court, or should it be tried on the equity side?

(2) Where a license contract containing a release of a claim for damages for violation of the anti-trust laws is otherwise an entirely legal contract, is such a contract shown to be *illegal* solely by reason of the allegation that the contract was executed involuntarily as a result of economic pressure exerted by the possessor of an illegal monopoly?*

* In this brief the second of these questions is discussed first.

Statute Involved.

Section 274 (b) of the Judicial Code provides as follows:

> "In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

Statement of the Case.

The action is brought against the petitioner, Radio Corporation of America, by Raytheon, Inc., a Massachusetts corporation, under the name of Raytheon Manufacturing Company, which name it had formerly borne (R. 3, 12, 13). The action is alleged to be brought, however, not for the benefit of the nominal plaintiff, but for the exclusive benefit and at the expense of the Raytheon Manufacturing Company (R. 12-13), a Delaware corporation organized by the respondent in May, 1928 (R. 11, 13, 21). The sole cause of action in suit is alleged to be one which accrued to the Massachusetts corporation (the nominal plaintiff) and "wholly existed before May 28, 1928, and before the organization of said Delaware corporation and which said cause of action did on or about May 28, 1928, by understanding and agreement between said two corporations become the

property of said Delaware corporation" (Disclaimer, R. 12). Any other cause of action is expressly disclaimed (R. 13).

The writ, with an *ad damnum* of $15,000,000, is dated December 14, 1931 (R. 1, 2). The declaration contains two essentially similar counts. For present purposes no distinction need be observed between the two. The allegations which seek to establish the cause of action show a scheme, conceived by petitioner about 1926 (paragraph 7 of each count, R. 4-5, 15) to monopolize interstate commerce in radio apparatus and radio communication, carried out by means of the acquisition of patents (paragraphs 8-12 of each count, R. 5, 15-16) and the granting in 1927 of licenses to third parties for the manufacture of radio *sets* containing "tying clauses"* (paragraphs 18-28 of each count, R. 7-8, 17-19), as a result of which respondent's business (the manufacture and sale of radio *tubes*) languished and was totally destroyed by late 1927 or early 1928 (paragraph 34 of each count, R. 10, 20).

The petitioner, in its answer (R. 28), set up among other defenses a release under seal executed by the respondent. This release was incorporated in a license contract (not of the kind alleged to contain "tying clauses") and supple-

---

* It should be borne in mind throughout the case that the license contract in question here, of which the release is a part, executed between the petitioner and the Raytheon Companies in March of 1929 (R. 42-54), is a license for the manufacture of radio *tubes*, and is entirely distinct from the earlier license contracts alleged in the declaration to have been granted by the petitioner in 1927 to *third parties* (manufacturers of radio *sets*), as a step in the creation of the petitioner's alleged monopoly (Declaration, Count I, paragraphs 19-27, R. 7-9; Declaration, Count II, paragraphs 19-27, R. 17-19). The so-called "tying clause" designated as "Clause 9" contained in certain of these *set* licenses issued to third parties in 1927, which related to the purchase by the set licensee of tubes for installation in the sets manufactured by him, has no counterpart in the Raytheon *tube* license.

mental agreement (R. 42-52; 52-54) dated March 19, 1929 (R. 28, 42, 52), under which the petitioner licensed Raytheon Manufacturing Company (of Delaware) to manufacture and sell radio tubes under patents controlled by petitioner.

It is not questioned that the release covered the cause of action sued upon, and its execution is admitted.

The respondent, in fact, by anticipatory pleading in its declaration, affirmatively alleged the execution of this release and then went on to attack its validity on the ground that the contract had been executed involuntarily (paragraphs 35-37 of each count, R. 10, 20-21). The invalidity of the contract was alleged to arise from the fact that the petitioner had perfected a patent monopoly whereby the petitioner exercised an "illegal duress" upon the whole radio industry, that the respondent's business as a manufacturer of radio tubes had been destroyed by May, 1928, as a result of such control of the industry by the petitioner, and that in consequence the Raytheon Companies were driven, in 1929, to seek and accept a license contract from the petitioner, which contract contained the release in question. The specific allegations attacking the validity of the release, appearing in identical language in paragraphs 35, 36 and 37 of both counts of the declaration (R. 10, 20-21), are as follows:

> "35. Wholly because of this destruction and of the illegal duress aforesaid which the defendant had imposed as aforesaid on this industry and this interstate and foreign commerce, the plaintiff and its Delaware corporation were compelled to seek and accept a license from the defendant.
>
> "36. With knowledge of this compulsion and relying on its effectiveness, the defendant exercised its illegally acquired power as aforesaid to compel the plaintiff and its said Delaware corporation to execute a purported release of claims against the defendant.

"37. The illegal duress aforesaid by the defendant rendered said release void and the plaintiff has never executed a valid release of said claim."

In this posture of the pleadings, the petitioner made a motion for a transfer of the cause to the equity side of the court for a preliminary hearing on the issue raised by the respondent as to the validity of the release (R. 28-29). The grounds of the motion in substance were that the execution of the release was admitted; that the release was under the respondent's seal by adoption; and that, being under seal, the contract could not be set aside for duress except in equity, wherefore the issue should be tried in equity * (R. 28-29).

After a hearing, at which the release contract itself was introduced in evidence and inspected by the court (R. 41), the motion for transfer was granted on November 8, 1932 (R. 30). The respondent excepted (R. 30, 41). No question was raised by the respondent as to the fact that the release was under the respondent's seal by adoption and no evidence on the point was offered. The question is not referred to in the respondent's bill of exceptions (R. 41) or in its assignments of error (R. 61).

By amendment to its answer, the petitioner set up that the Raytheon Companies for more than two years since the execution of the license contract, and up to the time of the bringing of the action, had accepted and affirmed the contract which is sought herein to be repudiated, and, in par-

* The petitioner took the position that the respondent's anticipatory replication attacking the validity of the release set up an equitable defense (Judicial Code, section 274 (b)) to the release contract pleaded by the petitioner, or, in the alternative, that this anticipatory replication was properly equivalent to an equitable prayer for cancellation of the release, and that the proper practice required that the case be transferred to equity for a preliminary hearing on this issue. *Liberty Oil Co.* v. *Condon Bank*, 260 U.S. 235. The District Court so ruled (R. 30, 41).

ticular, that the Delaware Raytheon Company, for whose sole benefit the present action is alleged to be brought, had brought suit in the Massachusetts courts to enforce the contract and to enjoin the petitioner from terminating it* (R. 31-34).

After subsequent proceedings, including the denial of a motion by the respondent for jury issues in equity (R. 31, 35-36, 54-55), and the denial of a further motion by the respondent to rescind the order of transfer (R. 36, 37, 55), the *respondent itself* moved for the entry of a final decree in equity (R. 38, 39), and on February 19, 1934, a final decree was entered affirming the validity of the release and transferring the case back to the law side for further proceedings (R. 39-40). From this decree the respondent appealed (R. 40).

The Circuit Court of Appeals entertained the appeal under the decision of this Court in *Enelow* v. *New York Life Insurance Co.*, 293 U.S. 379 (R. 68-69), and vacated the orders and decrees of the District Court (R. 77). The court held, in the first place, that the correctness or incorrectness of the proceedings in the District Court depended upon the correctness of the original order of transfer to equity. If that order was correct, no error was found in the subsequent proceedings (R. 70). The court held, however, that the transfer was wrong because the issue raised as to the validity of the release was legal and not equitable. This conclusion appears from the opinion of the court to have been based upon the following considerations:

(*a*) The court expressed great doubt as to whether the decisions of this Court in *Hartshorn* v. *Day*, 19 How. 211, and *George* v. *Tate*, 102 U.S. 564, were still controlling (R.

* This case is reported in *Raytheon Manufacturing Co.* v. *Radio Corporation of America*, 286 Mass. 84, 190 N.E. 1. Pursuant to this decision, the Raytheon Company was granted an injunction which enjoins the Radio Corporation from terminating the very contract now claimed to be illegal and void.

72-73). It was held in those cases that, where a contract under seal was attacked for invalidity which rendered the contract voidable rather than void, the issue, not being available under the legal plea of *non est factum*, was triable only in equity. The refusal of the Circuit Court of Appeals to follow those decisions appears to have been based partly upon a reluctance to recognize any substantial distinction between sealed instruments and unsealed instruments (R. 73, next to last paragraph) and partly upon the conclusion that those cases had in effect been discredited by subsequent decisions of this Court (R. 73, last paragraph).

(*b*) The court recognized the existence of an irreconcilable conflict in the decisions in the lower federal courts upon the whole question of setting aside releases, both sealed and unsealed, in actions at law (R. 75).

(*c*) The court took the view that the license contract containing the release was not merely voidable for duress, but was *void* for *illegality* (R. 74-75). This view was based upon a misconstruction of the pleadings (see pp. 22-24, *infra*).

Specification of Errors.

The Circuit Court of Appeals erred—

(1) In refusing to follow the decisions of this Court in *Hartshorn* v. *Day*, 19 How. 211, and *George* v. *Tate*, 102 U.S. 564.

(2) In holding that a contract under seal can be avoided or rescinded for economic duress on the law side of the court.

(3) In holding that the license contract containing the release was an illegal agreement and accordingly *void*.

(4) In reversing the order of the District Court for transfer of the case to equity for a preliminary hearing upon the issue of the validity of the release.

Preliminary Analysis and Summary of Argument.

Two questions are presented here. The first is whether the respondent has raised an issue of illegality or merely an issue of simple duress—*i.e.*, do the respondent's pleadings raise any question as to the legality of the contract or show any ground for holding that the contract is more than merely *voidable*? The second question is whether, if the issue is one of the respondent's rights to rescind a voidable contract under seal, the issue is triable at law or in equity.

On the first question the petitioner contends that there is nothing in any pleading to impugn the legality of the contract. It is not suggested that any of the terms of the contract are illegal or improper or that any invalidity is disclosed within the four corners of the instrument. Neither is there any allegation whatever as to the practical effect of this contract, either for good or ill, on respondent's business. The respondent's attack upon the release is based solely upon circumstances existing before the contract was made and surrounding its execution. The only element of illegality relied on is illegality existing independently of this contract and entirely *dehors* the instrument. Under principles of law repeatedly enunciated by this Court, illegality *dehors* the contract does not convert an otherwise legal contract into an illegal one. Even if the release may have been rendered *voidable* because improper methods were allegedly used to compel its execution, it cannot be held to have been absolutely void.

On the second question the petitioner contends that, if the contract was voidable only, and not void, the respondent's attempt to escape its obligations thereunder necessarily amounts to a prayer for rescission. It is familiar law that a contract, which is merely voidable because of some defect affecting its execution, stands as a valid and

subsisting agreement unless and until it is avoided or rescinded. The respondent's claim that the release was invalidated for duress affecting its execution is, therefore, in legal effect a prayer for rescission of a subsisting contract. Since the contract in question is under seal, the petitioner contends that under the controlling decisions of this Court an attempt by the respondent to rescind the contract (also involving questions of ratification, election, laches and such matters) presents an issue which can only be tried in equity. The issue being equitable, the petitioner had the right to insist that it should be tried in the proper forum (that is to say, on the equity side of the court), and the District Court properly transferred the case to the equity side for preliminary hearing on this issue in accordance with the practice established pursuant to the decision of this Court in *Liberty Oil Co.* v. *Condon National Bank,* 260 U.S. 235, *supra.*

Argument.

I.

No issue as to the legality of the contract is raised on the allegations of the pleadings. The issue raised is merely one of the respondent's right to rescind the contract for alleged duress.

(*a*) *The question whether the facts alleged by the respondent are sufficient to raise any question of the legality of the contract, as distinguished from a question of its voidability, is one of practical importance apart from the question of whether the issue is triable at law or in equity.*

A contract which is contrary to law is, of course, a nullity. It is *void ab initio.* It has no legal effect and the parties cannot give it such effect. On the other hand, a contract which is in itself legal, but which has been improperly obtained through fraud or duress, is generally not void,

but is voidable only.* The right to rescind or avoid such a contract is, however, not an absolute right, but a qualified right; the party seeking to rescind must act with reasonable promptness and must act consistently. He cannot affirm the contract and accept its benefits and thereafter attempt to repudiate it.

Barnette v. *Wells Fargo Bank,* 270 U.S. 438, 444, 446.

Connolly v. *Bouck,* 174 Fed. 312 (C.C.A. 8); certiorari denied, 220 U.S. 610.

In the present case the respondent is attempting to set aside a contract of which it has already had the benefit. Its Delaware affiliate (for whose sole benefit the present action is brought, Respondent's Disclaimer, R. 12-13) has maintained a suit enforcing the contract against the petitioner (R. 32-33). See *Raytheon Mfg. Co.* v. *Radio Corporation of America,* 286 Mass. 84, 190 N.E. 1. If the contract was merely voidable, it is difficult to see upon what basis the respondent could hope to establish any right to rescission in the face of an apparently conclusive election to affirm and adopt the contract. The respondent's attempt

* There are, of course, instances where fraud in the *execution* of a contract, as distinguished from fraud in the *inducement,* will prevent the formation of any contract at all, as, for example, where one paper is substituted for another so that the party signing never intended to execute the contract. Such fraud, going to the legal existence of the contract itself, renders the contract absolutely void. *Hartshorn* v. *Day,* 19 How. 211, 223; *George* v. *Tate,* 102 U.S. 564, 570. So also duress might prevent the formation of a contract if it went the length of preventing the consummation of a legal act, as where a man's hand is taken and compelled to write his name. See *Fairbanks* v. *Snow,* 145 Mass. 153, 154. But no such situation is presented here.

Authorities in support of the well-settled rule that, like ordinary fraud, duress, falling short of physical compulsion, renders a contract voidable and not void are cited at p. 14, *infra.*

to read into the pleadings in this case an issue as to the legality of the contract is therefore a plain attempt to escape the consequences of its own conduct and to enable it to repudiate its obligation after having secured the benefit of the agreement. Thus the respondent, having successfully demanded in one court that the contract be enforced in its favour, now asks this Court to rule that it would be against public policy and a violation of law for the contract to be enforced by any court.

The reasoning of the Circuit Court of Appeals, giving colour to this claim of the respondent, will necessarily, unless modified by this Court, affect the further conduct of the case far beyond the immediate question of trying in law or in equity. The broad question is whether the respondent, if it establishes the facts alleged in its pleadings, will have on either side of the court an absolute right to escape its obligation on the ground that it was illegal and a nullity, or whether such right is in the nature of a right to rescission and therefore qualified by well-settled equitable principles such as laches and the election of remedies.

(*b*) *The only element of illegality set forth in the respondent's pleadings is entirely dehors the contract.*

The ground under which the respondent attacks the release is that its execution was involuntary. The charge is that a year prior to the execution of the release the petitioner had illegally destroyed the respondent's business; that as a result of this destruction and the "illegal duress" exercised by the petitioner upon the radio industry the respondent was "compelled to seek and accept a license" from the petitioner; that the petitioner "exercised its illegally acquired power" to compel the respondent to execute a release; and that "the illegal duress aforesaid . . .

rendered said release void'"* (Declaration, Count I, paragraphs 35-37, R. 10; Declaration, Count II, paragraphs 35-37, R. 20-21).

In all these allegations there is no suggestion whatever that any element of illegality is disclosed within the four corners of the instrument. It is not charged that the agreement taken by itself, was a contract in restraint of trade or that it contravened any law. It is not suggested that any of its provisions were illegal or that any of them were in any way unreasonable, unfair or oppressive in operation. Indeed, the pleadings are entirely silent as to the practical effect of this license contract, either for good or ill, upon respondent's business. In short the instrument, in and of itself, is accepted as a perfectly proper agreement.

The alleged invalidity of the contract is charged to arise wholly from circumstances *dehors* the instrument itself. The charge is that the contract was executed involuntarily, that the respondent's consent thereto was improperly obtained. The issue is directed exclusively to the circumstances surrounding the execution of the contract and to the factors which allegedly affected and overbore the respondent's free will. These matters were obviously and necessarily extraneous to the agreement itself. They existed prior to the making of the contract and independently of it. Otherwise they could not possibly have impelled its execution.

So also the only specific charge of illegality made by the pleader refers, not to the contract itself (which is nowhere characterized as an illegal agreement), but to the external situation which gave rise to the contract. The

* The allegation that as a result of the alleged duress the release was "void" is plainly a mere conclusion of the pleader and therefore inconclusive. The question whether the contract is void or voidable depends upon the legal effect of the facts pleaded. *Ritchie* v. *McMullen,* 159 U.S. 235, 241-242; *Chamberlain Machine Works* v. *United States,* 270 U.S. 347.

pleader alleges that the contract was executed under "illegal duress." It is the duress, not the contract, which is alleged to have been contrary to law.

Thus, on the pleadings, there is no suggestion that the contract created or promoted an illegal situation. At the most, the charge is that the respondent's motive for signing the contract was influenced by an extraneous illegal situation, existing independently of the contract.

(c) *Illegality existing dehors the contract and affecting only the motive for its execution may render the contract voidable, but does not render it absolutely void.*

We have already referred to the well-settled rule that, where the execution of a contract is improperly obtained through the exercise of duress (at least where the duress falls short of actual physical compulsion), the contract is not *void,* but is only *voidable,* and the party who has been wronged has the option either to affirm or disaffirm the contract at his election.

Barnette v. *Wells Fargo Bank,* 270 U.S. 438, 444, *supra:*

> "Acts induced by duress such as is here relied on, which operates only on the mind and falls short of actual physical compulsion, are not void in law, but are voidable only, at the election of him whose act was induced by it. *Andrews* v. *Connolly,* 145 Fed. 43, 46; *Miller* v. *Davis,* 52 Colo. 485, 494; *Eberstein* v. *Willetts,* 134 Ill. 101; *Fairbanks* v. *Snow, supra* [145 Mass. 153]; *Miller* v. *Lumber Co.,* 98 Mich. 163; *Oregon & P. R. R. Co.* v. *Forest,* 128 N. Y. 83."

See also—

Willett v. *Herrick,* 258 Mass. 585, 603.

Connolly v. *Bouck,* 174 Fed. 312 (C.C.A. 8); certiorari denied, 220 U.S. 610, *supra.*

The only possible ground for suggesting a distinction in the present case is that the duress relied upon is charged to have been "illegal duress." That is to say, the respondent charges that the duress allegedly exercised by the petitioner involved the commission of certain illegal acts. This circumstance is, however, plainly inconclusive, because the commission of an illegal act is typical in cases of duress. Duress is almost invariably illegal. It is illegal to assault a man or to threaten him with a bludgeon or a gun, but a contract induced by such means is plainly not an "illegal" contract. So also in cases of fraud. Obtaining property by false pretenses is a crime, and one who obtains a sale of property or a contract by fraudulent representations may be liable to prosecution. But a contract so obtained is not "illegal." It is not void, but merely voidable at the option of the party whose consent was thus improperly obtained.*

---

* If coercion were used to compel the execution of a contract containing illegal or oppressive terms, or if the practical effect of a contract obtained by coercion were to restrain trade, the contract might well be rendered illegal. An illustration of such a situation is presented in *Paramount Famous Lasky Corp.* v. *United States,* 282 U.S. 30, involving a compulsory arbitration clause contained in the standard form of motion picture exhibition contract. This compulsory arbitration clause included a provision by which an exhibitor's refusal to arbitrate or a refusal to abide by an award in connection with a dispute arising under any one of his contracts with any distributor automatically subjected the exhibitor to drastic penalties under all his contracts with all other distributors. The District Court found that the effect of this clause, when imposed by compulsion upon exhibitors, was oppressive and illegal (34 F. (2d) 984). This Court affirmed that conclusion. Cf. *Wolff Packing Co.* v. *Industrial Relations,* 262 U.S. 522. A case involving the question whether the illegality of this arbitration clause is separable from other provisions of the same contract or vitiates the agreement *in toto* is now pending before this Court. *Fox Film Corporation* v. *Muller,* No. 47, October Term, 1935.

The present case presents an entirely different problem, since no such provision is involved and since there is an entire absence of anything to show that in practical operation this contract was not

The distinction between illegality *inherent* in a contract and illegality *dehors* a contract which is merely *collateral* thereto has been often recognized in cases dealing with monopolies of the same type as that said to exist here.

In *Dennehy* v. *McNulta,* 86 Fed. 825; certiorari denied, 176 U.S. 683, the plaintiff sought to avoid a contract made by him with a party to an alleged conspiracy in restraint of trade on the ground that the contract had been made involuntarily under the economic necessity of dealing with the defendant. The Circuit Court of Appeals for the Seventh Circuit held that this charge did not render the contract illegal, saying (86 Fed. 825, 827):

> ". . . the mere fact that the corporation, as one of the contracting parties, may constitute an unjust monopoly, and that its general business is illegal . . . cannot serve, ipso facto, to create default or liability on its contracts generally; nor can such fact be invoked collaterally to affect in any manner its independent contract obligations or rights."

The court also said (p. 829):

> "At the utmost, the circumstances here assumed show an urgent need for the goods to keep up their stock and continue in trade, and to that end a business necessity to make their purchases from the illegal combination, because it so far controlled the market that they had reason to fear disastrous results if supplies were sought elsewhere. However urgent this need may have seemed

---

entirely favourable and fair to the licensee. In this situation no question arises as to the separability of the contract because no part of it is shown to be improper. Cf. *Columbia Pictures Corp.* v. *Bi-Metallic Inv. Co.,* 42 F. (2d) 873 (D.C. Colo.), where the motion picture contract was held to be separable, and, the illegal provision being thus out of the way, the balance of the contract was held to be valid notwithstanding charges of duress.

for preservation of business interests, it cannot operate to change the payment made upon such purchases from the voluntary character impressed by the contract into the involuntary payment which may be reclaimed. *Emery* v. *City of Lowell,* 127 Mass. 138, 140; *Custin* v. *City of Viroqua,* 67 Wis. 314, 320, 30 N. W. 515, and cases cited; 6 Am. & Eng. Enc. Law, 71."

The mere fact that one of the parties to a contract is also a party to an illegal combination in restraint of trade is immaterial; in order to repudiate a contract for illegality it must be shown that the illegality relied on is inherent in the particular contract in question.

Connolly v. *Union Sewer Pipe Co.,* 184 U.S. 540.
Wilder Mfg. Co. v. *Corn Products Co.,* 236 U.S. 165.
A. B. Small Co. v. *Lamborn & Co.,* 267 U.S. 248.

In the *Connolly* case the plaintiff sued to recover the price of pipe sold. Defendant set up that plaintiff was a combination illegal under the Sherman Act and that the action was to recover for pipe "sold to the defendant by the plaintiff, then and there acting and doing business as such a combination, as aforesaid, in violation of the provisions of said act" (184 U.S. 543). In other words, the allegation was made that the contract of sale was a part of the conduct made illegal by the statute. The Court assumed that the statute had been violated, but held that there could be recovery. It was pointed out that, in spite of the allegation, the contract of sale was collateral only to the illegal combination and so was not tainted by its illegality. The Court said (at p. 551):

"So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangements made by

it with other corporations, companies and firms. . . . That combination may have been illegal, and yet the sale to the defendants was valid."

In *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U.S. 165, *supra*, where the same situation was presented, the Court reiterated its holding in the *Connolly* case and expressly pointed out that the fact that a contract might be beneficial to the possessor of a monopoly does not import the illegality of the monopoly into the contract. The Court said (at p. 172):

". . . And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so or some remote aid to the accomplishment of a wrong which might possibly result—doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express ruling in *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, applying them to the identical general question here involved."

The same decision was likewise reached in *A. B. Small Co.* v. *Lamborn & Co.*, 267 U.S. 248, *supra*. Here the defendant set up as a defense to an action to recover for goods sold that the seller was a member of a combination illegal under the anti-trust laws and "that the seller conformed the terms of sale to standards sanctioned by the combination" (p. 252). Again the Court held the defense unavailing, and said (at p. 252):

"As has been pointed out in prior cases, there is nothing in the Anti-Trust Act which invalidates such a collateral contract or relieves the buyer from his

obligation under it. *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 550-552; *Continental Wall Paper Co.* v. *Voight*, 212 U.S. 227, 257-259; *Wilder Manufacturing Co.* v. *Corn Products Co.*, 236 U.S. 165, 177. It is only where the invalidity is inherent in the contract that the Act may be interposed as a defense."

These principles apply with equal force to a patent license.

Gasoline Products Co. v. *Champlin Ref. Co.*, 46 F. (2d) 511 (D.C. Me).

No distinction can be drawn between the contracts considered in these cases and the tube license agreement which contained the release in the case at bar. In the cited cases the plaintiffs made the contracts in the course of the business which they had monopolized in violation of the statute. In each instance the pleader did his best to show that the contract was part of the general illegal activity of the plaintiff. In each instance this was held to constitute no defense. The allegations of the present declaration do not go as far as those there considered.

The respondent argues that it would be "against public policy" for this Court to assist the petitioner, as the alleged possessor of an illegal patent monopoly, by enforcing the license contract in question. Apart from the fact that the respondent has already induced another court to enforce the same contract for its own benefit, the short answer to this contention is found in the settled rule that the petitioner could have brought suit to prevent the respondent from infringing its patents, and the charge of monopoly would have been no defense in such a suit.

Virtue v. *Creamery Package Mfg. Co.*, 179 Fed. 115 (C.C.A. 8); affirmed, 227 U.S. 8.

O. & W. Thum Co. v. *Dickinson*, 245 Fed. 609 (C.C.A. 6); certiorari denied, 246 U.S. 664.

Radio Corporation of America v. *Hygrade Sylvania Corp.*, 10 Fed. Supp. 879 (D.C. N.J.), and cases cited.

On the contrary, the law does not favour a party who, after receiving the benefits of a contract, seeks to repudiate the burdens on the ground that the entire contract is illegal.

Steele v. *Drummond*, 275 U.S. 199, 205.
Cincinnati Packet Co. v. *Bay*, 200 U.S. 179.

Such a party must make a very clear showing of illegality. No such showing has been made here.

The respondent relies upon the decision of this Court in *Continental Wall Paper Co.* v. *Voight*, 212 U.S. 227. That decision, however, merely illustrates the essential distinction between illegality inherent in the contract and illegality *dehors* the contract. The decision in the *Voight* case holding the contract there in question to be void was based upon the fact that the contract there in question contained in itself illegal elements. This was carefully pointed out by Mr. Chief Justice White in the *Wilder Mfg. Co.* case. Referring to the *Voight* case, he said (236 U.S. 165, 177):

> ". . . the ruling in that case was based not upon any supposed right to import into a legal and valid contract elements of wrong which there was no right to consider, but was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case which elements of illegality may be thus summarized: (a) the relations of the contracting parties to the goods sold, (b) the want of real ownership in the seller, (c) the peculiar obligations which were imposed upon the buyer, and (d) the fact that to allow the nominal seller to enforce the payment of the price would have been in and of itself directly to sanction and give

effect to a violation of the Anti-Trust Act inhering in the sale."

In connection with the *Voight* case, it should be observed that Mr. Justice Holmes, in a dissenting opinion in which Mr. Justice Brewer, Mr. Justice White and Mr. Justice Peckham concurred, took up the question of duress, an aspect of the case not considered in the majority opinion. He concluded that, even if a case of duress could have been made out, it would not avail the defendant, who had received and retained the benefit of the contract (212 U.S. 227, 271-272).

"Perhaps, in order to answer every aspect that this rambling defense presents, I ought to say in conclusion that the allegations that the price was unreasonable, and that the plaintiff threatened and had power to drive jobbers out of business that did not come into its arrangement, is not stated in such form as to make a case of duress. I think that that would have been the strongest ground on which the defense could have been put. Courts and legislation sometimes have recognized that the so-called freedom to contract or not may be made illusory by the economic situation of one of the parties. *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1, 12. It would be extending the recognition further than it yet has been extended, so far as I am aware, to apply it to a case like this. But I express no opinion upon its possible application because, as I have said, the allegations are not directed to that end, and do not sufficiently show that the specific purchases were induced by fear. *Moreover, as such duress, like fraud, goes only to motives,* The Eliza Lines, *199 U. S. 119, 131, if the frightened or defrauded party would rescind he must restore the consideration, or at least be ready to pay the reasonable price, of neither of which is there any hint.*" [Italics supplied.]

This amounts to an express recognition of the fact, which the majority opinion in no way disputes, that duress involving the exercise of illegal and monopolistic powers is not different from any other kind of illegal duress. While it may give rise to a right of rescission, it does not *of itself* render a contract illegal or void.

(*d*) *The determination of the Circuit Court of Appeals that the contract was an illegal agreement is based upon a misconception of the facts alleged in the pleadings.*

The Circuit Court of Appeals, in holding that the release was an illegal agreement and therefore not to be enforced, wholly misconstrued the allegations of the declaration. This misapprehension appears in the following statements made by the court:

> "The plaintiff's declarations set up as a cause of action a contract made in violation of the anti-trust laws,—a contract which is declared by a statute to be illegal. . . . Duress is a ground upon which the plaintiff seeks to avoid the consequences of his own act in entering into an illegal agreement.
>
> "Conceding that in ordinary cases an instrument executed under duress is voidable, not void . . . this cannot be so if the effect would be to give life and substance to an illegal contract.
>
> "In the case before us the release alleged to have been signed under duress enters into and forms an integral part of an agreement alleged to be illegal because establishing a monopoly in restraint of interstate trade . . ." (R. 74).
>
> . . . . . .
>
> "We hold that the validity of the contract is the primary issue to be tried . . ." (R. 75).

It has already been pointed out, possibly with tiresome iteration, that there are no allegations showing illegality inherent in the contract itself. The court, however, saw fit to go further than the pleader and supply allegations which he chose not to make. The statement that the contract was "alleged to be illegal because establishing a monopoly" (which is not true) can be explained only upon the theory that the court confused the Raytheon *tube* license containing the release with one of the restrictive *set* license contracts, made by the petitioner with third parties, by which the petitioner's monopoly was alleged to have been created and upon which the respondent based its affirmative cause of action and claim for damages.

This interpretation of the pleadings is demonstrably erroneous. The monopoly upon which the respondent's cause of action is based is alleged to have become effective in 1927, and it is specifically charged that by the end of 1927 and early part of 1928 the effect of the alleged monopoly had been completely to destroy the respondent's business (paragraph 34 of each count, R. 10, 20). Furthermore, it is expressly stated in the respondent's disclaimer (R. 12-13) that its cause of action was complete and wholly existed prior to May, 1928. The Raytheon tube license and release, on the other hand, was not executed until March, 1929 (R. 28, 42, 52), a year after the perfection of the alleged monopoly and a year after the respondent's cause of action became complete. It is a factual impossibility on the record to suggest, as the Circuit Court of Appeals has done, that the release contract formed any part of the respondent's cause of action, or that it contributed to the creation of the monopoly which destroyed the respondent's business a year before it was executed.*

* The distinction between the Raytheon *tube* license containing the release (executed in 1929) and the *set* licenses alleged to have been issued to third parties in 1927, the latter contracts alone con-

The misconception into which the court fell probably had its rise in certain statements contained in respondent's brief below. It is there suggested, without reference to any of the specific allegations of the declaration, that the release constituted some part of the supposed conspiracy to monopolize. One of these statements is quoted in the respondent's brief in opposition to the petition for certiorari, where (p. 3) it is said:

> "The plaintiff says (not that a monopolizing corporation is an outlaw for which a court will not enforce a contract—but—) that 'it is contrary to public policy for a court of *law* of the United States to assist a wrongdoer to carry out his plot to restrain commerce and obtain a monopoly by enforcing for the wrongdoer a release obtained by the duress upon the releasor of the illegal monopoly which the release has created; it is not that the releasor seeks the assistance of a court to cancel the release; it is that the release is initially void' (Plaintiff's Brief in C.C.A. p. 6; Opinion R. 80 line 28, 81 lines 8 and 24, 82 line 2; Declaration para. 35-40, R. 21, 22)."

But enforcing the release could not possibly "assist" petitioner "to carry out his plot" when it is alleged the plot was completely carried out and the cause of action had accrued a year before the release was signed. The further statement that the release was "obtained by the duress . . . of the illegal monopoly which the release has created" is an absurdity on its face. It is a statement that *the release itself compelled its own execution.*

The Circuit Court of Appeals has decided the case upon a theory of illegality which not only is unsound but which is not even presented by the pleadings.

---

taining the "tying clauses," known as "Clause 9," upon which plaintiff predicates its claim to monopoly, has already been pointed out (*supra*, footnote, p. 4).

(e) *Summary.*

We do not contend that (accepting the allegations of the pleadings) the respondent was from the outset without any remedy, or that the release contract which the respondent itself sets up was originally proof against all attack.

We do contend, however, that the issue presented upon the pleadings was simply whether the respondent might avoid the release for duress. There was no issue tendered of illegality inherent in the contract containing the release which would render it void *ab initio*. Whatever issue of illegality appeared from the pleadings was illegality *dehors* the instrument which under well-established rules of law could do no more than render the contract voidable.

The respondent could not with honesty make allegations showing illegality in the contract, and it did not do so. But it has with great skill succeeded in coaxing the court below into construing allegations looking toward voidability as allegations flatly charging illegality. When the case was heard in the District Court the question was whether, under *Hartshorn* v. *Day*, 19 How. 211; *George* v. *Tate*, 102 U.S. 564, and similar cases, the rescission of a sealed instrument could be tried at law or must go to the equity side. The district judge squarely met that issue and ruled upon it. The Circuit Court of Appeals sought to evade it by torturing the allegations actually made into something quite different. In so doing it committed serious error. If the petitioner is forced to trial to a jury with the opinion unchanged, it will be greatly handicapped and a false issue must be tried. The true issue still remains that of whether the respondent may now exercise an election to avoid its release.

II.

An issue as to the rescission of an instrument under seal, especially where the contract has been executed, is triable in equity. The District Court properly ordered that the case be transferred to equity for preliminary hearing.

(*a*) *Under the decisions of this Court in* Hartshorn *v.* Day, *19 How. 211, and* George *v.* Tate, *102 U.S. 564, a sealed instrument may be rescinded only in equity.*

For the reasons pointed out in the first section of this brief the petitioner submits that no issue is raised as to the legality of the release contract. On the pleadings this contract is not void, but is at most voidable for duress. The respondent's attempt to repudiate the contract, therefore, is in legal effect an attempt to obtain rescission. Such rescission can be granted only in equity.

In *Hartshorn* v. *Day,* 19 How. 211, and *George* v. *Tate,* 102 U.S. 564, this Court held that fraud in the inducement of a contract, that is to say, fraud rendering the contract not void but merely voidable, could not be set up against a sealed* instrument except in equity. In *Hartshorn* v. *Day,* the Court said (19 How. 211, 222-223):

---

* In the Circuit Court of Appeals the respondent for the first time raised a question whether the contract containing the release should have been treated as a contract under seal. This question, however, was not raised in the District Court. The Circuit Court ruled that it could not be raised for the first time on appeal (R. 72). This ruling was plainly correct. The petitioner's motion for transfer set out that the release was under seal by adoption (R. 29), and the respondent did not contest the point. The court inspected the contract before granting the motion (R. 41) and accepted it as a sealed instrument. Since the principal license agreement, containing a full release of all claims by the licensee (the real party in interest here—R. 12-13), was under the seal of all parties, including Raytheon Manufacturing Company (R. 52), the District Court could not have done otherwise than treat it as a sealed instrument. And in view of the fact that the modifying agreement was under the seal of one party (R. 54) and the further fact that by New York

"The general rule is, that in an action upon a sealed instrument in a court of law, failure of consideration, or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between parties and privies to the deed; and, more especially, where there has been a part execution of the contract. The difficulties are in adjusting the rights and equities of the parties in a court of law; and hence, in the States where the two systems of jurisprudence prevail, of equity and the common law, a court of law refuses to open the question of fraud in the consideration, or in the transaction out of which the consideration arises, in a suit upon the sealed instrument, but turns the party over to a court of equity, where the instrument can be set aside upon such terms as, under all the circumstances, may be equitable and just between the parties. A court of law can hold no middle course; the question is limited to the validity or invalidity of the deed.

---

law a sealed instrument cannot be modified except by an instrument also under seal (*Cammack* v. *Slattery & Bro. Inc.*, 241 N.Y. 39, 148 N.E. 781), the court was plainly justified in treating this agreement, which in effect formed part of the original sealed contract, as being itself under Raytheon's seal by adoption, especially where the respondent did not contest but apparently conceded the point.

The respondent attempts to rely on Massachusetts General Laws (Ter. Ed.) c. 231, sec. 34, on the theory that allegations in the answer are deemed denied without the necessity of a replication (see Respondent's brief in opposition to petition for certiorari, p. 5). But this statute is of no assistance to the respondent in any event, because the respondent here filed a replication (incorporating it in its declaration) which set up duress, but was silent on the question of seals. Under Massachusetts practice, where a replication is filed putting in issue only certain matters raised in the answer, the matters omitted would not be deemed to be denied. They would be taken as admitted. *Friend* v. *Pettingill*, 116 Mass. 515, 518. *Murphy* v. *People's Equitable Mutual Fire Ins. Co.*, 7 Allen, 239.

"Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence."

In *George* v. *Tate* the Court said (102 U.S. 564-570):

"It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give."

Hogg v. *Maxwell,* 218 Fed. 356 (C.C.A. 2).
Whitcomb v. *Schultz,* 223 Fed. 268 (C.C.A. 2); certiorari denied, 238 U.S. 632.
Massachusetts Protective Assn. v. *Kittles,* 2 F. (2d) 211 (C.C.A. 5).
Pringle v. *Storrow,* 9 F. (2d) 464 (D.C. Mass.).
See also *Keatley* v. *U.S. Trust Co.,* 249 Fed. 296 (C.C.A. 2); certiorari granted, 247 U.S. 511; withdrawn, 254 U.S. 658.

The Circuit Court of Appeals apparently conceded that the rule enunciated in *Hartshorn* v. *Day* and *George* v. *Tate* as applied to cases of fraud would apply equally to cases involving duress (R. 71). Duress is equivalent to fraud in its effect upon the validity of a contract obtained by its means. As pointed out by Mr. Justice Holmes in *Fairbanks* v. *Snow,* 145 Mass. 153, 154:

"Again, the ground upon which a contract is voidable for duress is the same as in the case of fraud; and is,

that, whether it springs from a fear or from a belief, the party has been subjected to an improper motive for action."

It is well settled that duress falling short of actual physical compulsion, like fraud in the inducement, renders a contract voidable and subject to rescission, but not void.

Barnette v. *Wells Fargo Bank,* 270 U.S. 438, 444, *supra.*
Willett v. *Herrick,* 258 Mass. 585, 603, *supra.*

At common law, duress falling short of actual physical compulsion was not recognized as a ground for avoiding a deed. As stated by Powell, Justice, in *Sumner* v. *Ferryman* (1709), 11 Mod. 201, 203):

"A man cannot avoid his bond by duress to his goods, but only to his person."

See also *Atlee* v. *Backhouse* (1838), 3 M. & W. 633, 650.
Sheppard's Touchstone, 61.
Brown v. *Pierce,* 7 Wall. 205, 214, 215.

At an early date, however, equity assumed a jurisdiction to relieve against legally unimpeachable bonds and contracts where obtained through a trading upon the economic necessities of an improvident plaintiff.

Vere Essex, Earl of Ardglasse, v. *Muschamp* (1684), 1 Vern. 237.
Earl of Chesterfield v. *Janssen* (1750), 1 Atk. 301.
Lamplugh v. *Cox* (1769), Dick. 411.

"Economic duress" has latterly been adopted as a convenient name for this practice of using the practical busi-

ness necessities of the improvident or unfortunate to obtain an unconscionable legal advantage. But it is important to bear in mind that the words refer simply to the age-old practice against which the law gave no relief, and that, though the language of the law is used, it refers to an equitable jurisdiction.

Thus at the time that the Constitution was adopted providing for a federal judicial power extending "to all cases, in law and equity" (art. III, sec. 2), it seems to have been settled that "economic duress" could not be set up against a sealed instrument in a court of law, but only in a court of equity.

This Court has often stated that the essential distinction between law and equity, as thus established in English jurisprudence, forms the basis for the distinction between law and equity as preserved in the federal courts.

> *Bennett* v. *Butterworth,* 11 How. 669.
> *Fenn* v. *Holme,* 21 How. 481.
> *Thompson* v. *Central Ohio R. Co.,* 6 Wall. 134.
> *Lindsay* v. *First Nat'l Bank of Shreveport,* 156 U.S. 485, 493.
> *Liberty Oil Co.* v. *Condon National Bank,* 260 U.S. 235, 243, *supra.*

It follows, therefore, that the distinction between law and equity which was recognized by this Court with respect to instruments under seal in *Hartshorn* v. *Day* and *George* v. *Tate* exists also in cases involving "economic duress" as well as fraud.

It was at one time suggested that the passage of section 274 (b) of the Judicial Code permitting equitable defenses to be raised in actions of law had the effect of converting equitable defenses into legal ones, thereby abrogating the

distinction between law and equity in cases of sealed agreements.

See *Columbia-Knickerbocker Trust Co.* v. *Abbott*, 247 Fed. 833, 837 (C.C.A. 1, 1917).

All questions as to the effect of section 274 (b) were, however, set at rest by the decision of this Court in *Liberty Oil Co.* v. *Condon National Bank*, 260 U.S. 235, *supra*. It was there held that, under section 274 (b), equitable defenses were not changed into legal ones, but that, on the contrary, the distinction between law and equity, as existing at the time when the Constitution and the Seventh Amendment were adopted, is fully preserved (260 U.S. 235, 242-243).

Union Pacific R.R. v. *Syas*, 246 Fed. 561 (C.C.A. 8).

The respondent contends, however, that *Hartshorn* v. *Day* and *George* v. *Tate*, although never expressly overruled, have been impliedly overruled by subsequent decisions of this Court. One line of cases particularly relied on includes *Insurance Co.* v. *Bailey*, 13 Wall. 616; *Cable* v. *U.S. Life Ins. Co.*, 191 U.S. 288, and culminates in the recent decisions of this Court in *Enelow* v. *New York Life Ins. Co.*, 293 U.S. 379, and *Adamos* v. *New York Life Ins. Co.*, 293 U.S. 386.

It was held in these cases that fraud in the procurement of a life insurance policy could be set up as a legel defense in an action at law upon the policy. But it is plain that, since ordinary insurance policies are not specialties, these cases are in no way inconsistent with the rule laid down in *Hartshorn* v. *Day* and *George* v. *Tate* as applicable to sealed instruments. This was expressly pointed out in—

Hogg v. *Maxwell*, 218 Fed. 356, 358 (C.C.A. 2), *supra*.

Where an insurance policy, contrary to the ordinary practice, is executed as a specialty, the rule of *Hartshorn* v. *Day* does apply and the issue is equitable.

Massachusetts Protective Ass'n v. *Kittles*, 2 F. (2d) 211 (C.C.A. 5), *supra*.

A late case illustrating the distinction is—

Dunn v. *Prudential Ins. Co. of America*, 8 Fed. Supp. 799 (D.C. Minn.).

The respondent also relies upon the decision of this Court in *American Mills Co.* v. *American Surety Co.*, 260 U.S. 360. That case was a suit in equity to cancel a contract of guaranty on the ground of fraud. Although the fact is not so stated in the report of the case in this Court, it has been said that that case involved a bond (see *Nat'l Aniline & Chemical Co.* v. *Arnhold*, 298 Fed. 755, 756 (D.C. N.Y.)). The question raised in this Court was whether or not the defendant had waived its objection to the equity suit on the ground that there was an adequate remedy at law by failing to press the objection in the trial court. It was held that the objection had been waived and a decree for the plaintiff was affirmed. Thus the result of the case is in no way inconsistent with the result for which the petitioner contends in this case. The respondent, however, relies upon the following statement appearing in the opinion (260 U.S. 360, 363):

> "It is conceded by the respondent that its bill in equity in the District Court should have been dismissed because it had an adequate remedy at law. The cases of *Insurance Co.* v. *Bailey*, 13 Wall. 616, 622, and *Cable* v. *United States Life Insurance Co.*, 191 U. S. 288, 306, 307, settle that. Respondent therefore relies solely

on the waiver of this defect by the Mills Company in doing what it did in the District Court."

The petitioner submits, however, that this statement by the Court, which in no way affected the result of the case, and which furthermore was based upon a point conceded by counsel, does not mean that this Court was then overruling its earlier decisions of *Hartshorn* v. *Day* and *George* v. *Tate*. No question was raised as to the possible effect of a seal. Neither *Hartshorn* v. *Day* nor *George* v. *Tate* was cited. Apparently the point was entirely overlooked by counsel, who assumed that the case was governed by decisions relating to unsealed instruments, and, on that assumption, conceded the point. This Court merely adopted this assumption and concession. The decision stands on no different footing from the decisions in the *Cable* case and the *Bailey* case, and cannot be regarded as having overruled *Hartshorn* v. *Day* or *George* v. *Tate*.* Such was the conclusion reached by Judge Lowell in *Pringle* v. *Storrow*, 9 F. (2d) 464, 467 (D.C. Mass.), *supra*.

Another line of cases upon which the respondent placed reliance in the court below and which may be referred to by it here are cases involving fraud in the *execution* of an instrument, that is to say, fraud preventing the existence of any contract at all, such as the substitution of one paper for another by trick. Such fraud, however, has always been admissible in a court of law even as against a sealed instrument. Indeed, this rule was specifically affirmed in

* Neither is there anything inconsistent with the continued authority of these cases in later decisions of this Court in cases where, through the nature of the proceedings involved, the distinction between law and equity did not obtain. See, for example, *Pacific Mails S.S. Co.* v. *Lucas*, 258 U.S. 266 (Admiralty); *Hartsville Mill* v. *United States*, 271 U.S. 43 (Court of Claims); *Snyder* v. *Rosenbaum*, 215 U.S. 261 (Territorial Court, see U.S. Code, Title 48, sec. 1464).

Hartshorn v. *Day* and *George* v. *Tate,* as appears in the portions of the opinions which are quoted above (*supra,* pp. 27, 28). Cases holding that fraud in the execution of a contract may be shown at law even in the case of a sealed instrument are, therefore, entirely consistent with those decisions.

It is true that in many instances the distinction between fraud in the execution of a contract and fraud in the inducement of a contract has little practical importance. Accordingly it has sometimes been doubted whether the distinction any longer possesses a substantial basis. See *Wagner* v. *National Life Ins. Co.,* 90 Fed. 395 (C.C.A. 6); *Skinkle* v. *Lehigh Valley R. Co.,* 3 Fed. Supp. 326, 327 (D.C. E.D. N.Y.). The Circuit Court of Appeals here stated that the distinction has become worthless (R. 71).

A moment's consideration will show, however, that the distinction is one which may be of great practical importance, not because of the character of the fraud involved, but because of the distinction between a contract which is void and one which is merely voidable and subject to rescission upon equitable principles. Thus in this case, if the respondent's release was illegal and so void *ab initio,* the later dealings between the parties are wholly immaterial. If, however, it was no more than voidable, those later dealings, involving, as we submit, a free election to confirm the contract, are of the utmost importance on the focal question of whether it now may be avoided. Hence in cases of fraud the difference between the kind of fraud which will render a contract void and the kind of fraud which will render a contract voidable only is one which cannot be overlooked or disregarded.

The petitioner submits, therefore, that the cases of *Hartshorn* v. *Day* and *George* v. *Tate* have never been overruled, and that the rule enunciated in those cases is still the law in the federal courts. This would apply in the present case

in view of the fact that at common law economic duress was not admissible to avoid a sealed instrument, but was cognizable only in equity. To overturn this rule would run counter to the well-settled principle, stated in many earlier cases and reiterated in *Liberty Oil Co.* v. *Condon National Bank,* 260 U.S. 235, 243, *supra,* that the distinction between law and equity as preserved in the federal courts is based upon the practice in courts of law and chancery in England at the time of the establishment of the federal judicial system under the Constitution.

In this connection it should be observed that, by virtue of sections 274 (a) and (b) of the Judicial Code, in the practice established thereunder providing for a "change from a suit at law to one in equity and the reverse with as little delay and as little insistance on form as possible" (*Liberty Oil Co.* v. *Condon National Bank,* 260 U.S. 235, 244, *supra*), the strongest argument formerly urged against maintaining the established distinction between law and equity has been removed. Prior to the passage of this section it was natural that the courts, solicitous to alleviate the hardship of multiplicity of suits and circuity of action attendant upon a strict distinction between law and equity, should have tended to blur the distinction between law and equity by extending legal jurisdiction to matters previously regarded as equitable (compare *Wagner* v. *Nat'l Life Ins. Co.,* 90 Fed. 395, 404 (C.C.A. 6) *supra*).

(*b*) *Rescission of the present contract presents questions of laches, ratification, change of position and balancing of equities generally, which cannot be dealt with appropriately, except in equity.*

The equitable nature of the issue does not depend simply upon the fact that the release was a sealed instrument. Sealed or unsealed, what the respondent sought to do was

to rescind the tube license agreement containing it. Rescission is primarily an equitable jurisdiction even though it is now also exercised by courts of law to a limited extent. But that exercise can only be in appropriate cases—ones where it is practically possible for a jury to act upon the issue.

A jury verdict cannot appropriately balance the equities between the parties where rights have arisen under the contract sought to be rescinded. This was recognized by this Court in *Hartshorn* v. *Day* (see p. 27, *supra*).

> *Pacific Mutual Life Ins. Co.* v. *Webb*, 157 Fed. 155, 158-159 (C.C.A. 8):
>
> "The rescission of the deed of release sought to be accomplished in this case is essentially and traditionally an equitable remedy. It is peculiarly appropriate for the consideration of a chancellor and not of a jury. It depends in many cases upon the exercise of a wise discretion in the light of countervailing equities; is frequently awarded on conditions imposed in the final decree, and only when the remedy is invoked without unreasonable delay. The proof justifying it must be clear, convincing, and unequivocal. In view of these rules governing the administration of an equitable remedy, it is apparent that an action at law which is governed by more inflexible rules is not well adapted to administer that remedy. So manifest is this that rescission of contracts for fraud has, time out of mind, been a well-recognized subject of equitable cognizance." *
>
> *Levi* v. *Mathews*, 145 Fed. 152 (C.C.A. 4).
> *Cook* v. *Fidelity & Deposit Company of Md.*, 167 Fed. 95 (C.C.A. 9).

---

* Mr. Justice (then Circuit Judge) Van Devanter concurred in this opinion.

Standard Portland Cement Co. v. *Evans,* 205 Fed. 1 (C.C.A. 9).

Union Pacific R.R. Co. v. *Syas,* 246 Fed. 561 (C.C.A. 8), *supra.*

Fay v. *Hill,* 249 Fed. 415 (C.C.A. 8).

In the present case the release which respondent now seeks to avoid formed an integral part of an elaborate patent license agreement granted by the petitioner nearly a year after the respondent's alleged cause of action for damages is stated to have accrued. Respondent has received full benefit therefrom (R. 31, 32). Its Delaware subsidiary, for whose benefit it alleges that the present action is brought, has actually obtained a decree from the Supreme Judicial Court of Massachusetts enjoining the petitioner from terminating that very license agreement (286 Mass. 84). The present suit amounts in substance to an attempt by the respondent to disaffirm simply that portion of the agreement which imposes a burden upon it (namely, the release clauses), while it retains, and in fact insists on retaining, all the benefits conferred by the remainder of the agreement.

Whether the respondent under these circumstances, in the face of the benefits which it has received and the injunction which it has caused to be procured, can now disaffirm the contract obviously presents practical issues for the determination of a court of equity, including such problems as laches, election of remedies, ratification, change of position, restoration of benefits and balancing of equities generally.

American Shipbuilding Co. v. *Commonwealth S.S. Co.,* 215 Fed. 296, 301 (C.C.A. 6).

Although respondent's refusal to proceed in equity (R. 38-39, 56-60) prevented actual trial on these issues in equity, the issues were nevertheless in the case for trial (R.

31-34), and therefore necessitated the retention of the case in equity until they were finally disposed of by a final decree on the question of rescission of the contract (R. 40).

(c) *The order for transfer was proper.*

In the present case it must be remembered that it was the respondent itself (plaintiff below) which first raised the issue of the release in the pleadings. Respondent's own declaration as amended by its disclaimer (R. 12) contains three distinct elements:

1. An allegation that respondent has a cause of action under the anti-trust laws for damages against the petitioner.

2. An allegation that, after this cause of action had accrued, the respondent accepted a license from the petitioner and executed a release of its claims (Declaration, paragraphs 35 and 36 of each count, R. 10, 20, 21; Disclaimer, R. 12, 13).

3. An allegation that this release was "void" by reason of duress (Declaration, paragraph 37 of each count, R. 10, 21), followed by the allegation that respondent is entitled to recover upon the original cause of action notwithstanding the release.

Respondent, in other words, in its own pleadings first sets up the release and then seeks to allege facts justifying its avoidance. Viewing the situation most favourably from respondent's point of view, the declaration seeks, first, to have the release avoided and rescinded (a matter of purely equitable cognizance), and second, to recover at law for damages after the release is out of the way.

Prior to the passage of section 274 (b) of the Judicial Code, the respondent would have had to resort to a separate bill in equity in order to rescind the release contract.

Whitcomb v. *Schultz*, 223 Fed. 268 (C.C.A. 2); certiorari denied, 238 U.S. 632, *supra*.

Under section 274 (b) the necessity for a separate suit is removed.*

In *Liberty Oil Co.* v. *Condon National Bank*, 260 U.S. 235, *supra*, this Court held that the effect of section 274 (b) was not to convert equitable issues into legal ones. On the contrary, it was held that when, under this section, an equitable issue is raised by the pleadings in a law action, the case is automatically transformed, *pro tanto*, into a case in equity. When this situation occurs, the Court stated that the better practice is to order a transfer of the case to the equity side for hearing (p. 241). This practice was followed here.

It was proper for the petitioner to raise the point by its motion.

> *Union Pacific R.R. Co.* v. *Syas*, 246 Fed. 561 (C.C.A. 8), *supra*.

Indeed, if the petitioner had failed to raise the question, it would have run the risk of waiving it.

> *Union Pacific R.R. Co.* v. *Whitney*, 198 Fed. 784 (C.C.A. 8).
>
> *Whitney Co.* v. *Johnson*, 14 F. (2d) 24 (C.C.A. 9); certiorari denied, 273 U.S. 734.

---

* The conclusion of the majority of the court in *Keatley* v. *United States Trust Co.*, 249 Fed. 296 (C.C.A. 2); cert. granted, 247 U.S. 511, dismissed on petitioner's application, 254 U.S. 658, with respect to equitable issues raised by replication, clearly is not now law. It preceded *Liberty Oil Co.* v. *Condon Nat'l Bank*, 260 U.S. 235. There is nothing in the opinion in that case to justify a distinction based solely upon the fact that the equitable issue is raised by replication. It is flatly contrary to *Union Pac. R.R.* v. *Syas*, 246 Fed. 561 (C.C.A. 8), which has been cited with complete approval by this Court as lately as *Enelow* v. *New York Life Ins. Co.*, 293 U.S. 379, 384. See also *Stamey* v. *United States*, 37 F. (2d) 188 (D.C. Wash.).

The respondent contends that the petitioner's motion to transfer was wrongly granted because its effect was to force the respondent to resort to equity against its will. This argument overlooks the fact that the respondent was already in equity before the order was granted. Under the *Liberty Oil Co.* case, if the pleadings raise an equitable issue, the case becomes *pro tanto* an equity case *as soon as the pleadings are completed.* In that case this result was held to follow even though no formal order of transfer was ever entered. It follows, therefore, that since the legal effect of the respondent's pleadings in this case was to raise an equitable issue, it was these pleadings themselves, drafted by its own counsel, not the order for transfer, which put the respondent into equity.

(*d*) *No error appears in the subsequent proceedings.*

The issue being equitable, the respondent had no right to claim trial by jury. Its motion for jury issues in equity (R. 31) was addressed to the discretion of the court, and the denial of the motion presents no question for review.

Schnaubert v. *Tippett,* 29 F. (2d) 230 (C.C.A. 5).
Miller v. *Pyrites Co.,* 71 F. (2d) 804, 808 (C.C.A. 4); certiorari denied, 293 U.S. 604.

The respondent's subsequent motion to rescind the order of transfer and disclaimer of equitable relief (R. 36) did not affect the situation. By disclaiming relief in equity, the respondent could not acquire the right to obtain relief at law on an equitable issue.

The final decree, entered on the respondent's own motion (R. 38, 40), was correct. The equitable issue presented was a preliminary question to be tried before the case proceeded at law. As stated by this Court in the *Liberty Oil* case (260 U.S. 235, 242):

"Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then if an issue at law remains, it is triable to a jury."

The respondent was offered an opportunity to try the question in the proper forum. Whether the opportunity was desired or not, the respondent was not prejudiced by having had it. When the respondent refused to accept the opportunity and stated that it had no evidence to offer (Respondent's Motion for Final Decree, paragraph 3, R. 38), the court had no alternative but to enter a decree affirming the validity of the release.

The respondent's position was that it *would* not go forward in equity. It hazarded its entire case upon its contention, which had been rejected when the order for transfer was entered, that it was entitled to litigate the equitable issue of rescission at law. If it could not do that, it preferred to lose the case then and there rather than to try the preliminary issue in equity.

It was necessary to have some decree which would terminate the equitable issue which the respondent had injected into the case.

Union Pacific R.R. v. *Syas*, 246 Fed. 561 (C.C.A. 8), *supra.*

The issue could be resolved in only one of two ways, either by an avoidance of the tube license agreement containing the release, or by a declaration that it was valid. Since the respondent chose not to offer evidence on which the former alternative might be taken, the court of necessity was forced to enter a decree confirming the release.

Conclusion.

In this case respondent seeks to recover enormous damages at law upon a cause of action which (according to its own pleadings) it released after that cause of action had accrued. It seeks to avoid its release by an allegation (in the pleadings) of duress through economic pressure and by an argument (not presented in the pleadings, and in fact demonstrated by the pleadings to be unsound) that the release was "illegal." It seeks to accomplish all this without restoring the petitioners to the status quo, without returning, or offering to return, the benefits conferred by the license of which the release formed a part, and in the face of its own election to affirm that license, strikingly manifested by a state court decree which enjoins the termination of that license. When confronted with the opportunity of offering evidence (in equity) to support its extraordinary claims, it announced in open court that it had none to offer, made confession of default, and itself moved for the entry of the final decree from which it immediately appealed.

Under these circumstances, we respectfully submit that the District Court, both when it ordered the original transfer to equity and when it entered the decree now under review, acted in the only possible way. The decree of the District Court should accordingly be affirmed, and that of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

JOHN W. DAVIS,
JOHN L. HALL,
MANTON DAVIS,
CLAUDE R. BRANCH.

Supreme Court, U.S.
FILED
DEC 9 1935
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

Supreme Court of the United States.

October Term, 1935.

No. 127.

Radio Corporation of America,
Petitioner,
v.
Raytheon Manufacturing Company,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

REPLY BRIEF FOR PETITIONER.

JOHN W. DAVIS,
JOHN L. HALL,
MANTON DAVIS,
CLAUDE R. BRANCH,
Attorneys for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

OCTOBER TERM, 1935.

No. 127.

RADIO CORPORATION OF AMERICA,
PETITIONER,
v.
RAYTHEON MANUFACTURING COMPANY,
RESPONDENT.

REPLY BRIEF FOR PETITIONER.

STATEMENT.

Several points made in the respondent's brief are, we believe, without foundation and are perhaps likely to cause some misapprehension unless explained.

The first is the contention that there was no issue for transfer to equity because the respondent in its pleadings was only asserting its rights at law. This argument assumes the very question in issue, which is whether, in respect of the releases, the respondent's pleadings asserted any rights at law at all.

The second is the contention that the District Court should not have determined that a sealed instrument was involved and that the question should have been tried to a jury. This point, even if sound, is not open because it was never raised in the District Court. In any event, the determination of the District Court that a sealed release was in-

volved was plainly correct; it was inescapable on the record.

The third is the contention (made throughout the respondent's brief and particularly significant because it is relied on as the chief basis for the respondent's charge that the release was illegal and oppressive) that the release was obtained without consideration. This contention, which is made for the first time here, is not merely unsupported by anything in the record, but is inconsistent with facts which do appear in the record.

Before considering these matters we should also point out that there is possibility that confusion may arise as to the release in question from the ambiguous fashion in which the respondent refers in numerous places to the Raytheon Companies and the provisions of the March 19, 1929, document. To avoid this we urge the Court to keep in mind the following undisputed facts:

(1) The only plaintiff-respondent is the *Massachusetts* corporation *Raytheon, Inc.* It sues under an alias, using its former name, Raytheon Manufacturing Company (R. 3, par. 1).

(2) The only cause of action stated is alleged to have accrued to *it*, Raytheon, Inc., *before* May 28, 1928 (Disclaimer, R. 12, 13).

(3) On May 28, 1928, there was incorporated in *Delaware* the corporation *Raytheon Manufacturing Company*, and Raytheon, Inc., then by oral agreement assigned to it this cause of action (R. 11, 12, 13, 21, 35).

(4) Under date of March 19, 1929, a patent license and a supplementary agreement, each containing releases, were executed as one transaction (R. 42-54).

(5) By the agreement of March 19, 1929, the petitioner granted: (*a*) a patent license to Raytheon Manufacturing Company (of *Delaware*) (R. 43-45); (*b*) a general release to both Raytheon Manufacturing Company (of *Delaware*) *and* Raytheon, Inc. (of *Massachusetts*) (R. 53-54).

(6) By the agreement of March 19, 1929, Raytheon Manufacturing Company (of *Delaware*) in return (*a*) agreed to pay royalties and (*b*) granted two general releases to the petitioner (R. 50, 54), subject to the provision that notwithstanding these general releases, it might bring suit against the petitioner for any damages claimed by *it* (not those accruing to Raytheon, Inc., the present plaintiff-respondent) subject to three limitations and qualifications (R. 53, par. 3):

(*a*) That "the Licensee" (*Raytheon Manufacturing Company* of *Delaware*) should not bring suit unless and until Radio Corporation had paid damages (whether by judgment or settlement) to other plaintiffs having similar causes of action;

(*b*) that "the Licensee" (*Raytheon Manufacturing Company* of *Delaware*) should in no event be entitled to recover more than the maximum paid to any such other plaintiff;

(*c*) that any judgment obtained by "the Licensee" (*Raytheon Manufacturing Company* of *Delaware*), thus limited in amount, should be satisfied only by credit against royalties due from it under the license.

(7) By the agreement of March 19, 1929, Raytheon, Inc. (of *Massachusetts*), the plaintiff-respondent here, also granted a general release to the petitioner (R. 54).

In its declaration respondent has attacked (pars. 36, 37, R. 10, 21; pars. 39-40, R. 11, 21-22) both the release granted by it and that granted by Raytheon Manufacturing Company (of Delaware).

ARGUMENT.

I.

The respondent's first claim, that in attacking the release it "unequivocally alleged only its rights at law" (Respondent's Brief, p. 16), assumes the point in issue.

The primary question for decision here is whether the respondent has asserted any legal rights at all. To argue that, because the respondent did not raise an equitable right it therefore must be taken to have alleged only legal rights, is to argue in a circle.

The nature of the rights asserted by the respondent in the attack upon the release depends upon the legal effect of the facts pleaded, not upon intentions or desires of the pleader. A pleader might prefer to try a bill of interpleader to a jury or to obtain a decree for specific performance or for an injunction in a court of law, but asserting such rights as "rights at law" would not make them such. If the pleadings ask for a result which cannot be obtained at law, they do not assert legal rights; at law they assert no rights at all.

The assertion that section 274b of the Judicial Code is not involved in the case similarly assumes the point; it assumes that the respondent's pleadings stated a case for relief at law without the necessity for equitable intervention. But this is the very question to be decided.

Under the old practice, if a defendant in an action at law pleaded a release under seal and the plaintiff replied admitting the execution of the release, but asserting that it was invalid because obtained by fraud or duress, the defendant could have demurred to the reply on the ground that it failed to show any rights cognizable at law. Under the rule in *Hartshorn* v. *Day*, 19 How. 211, and *George* v. *Tate*, 102 U.S. 564, such a demurrer would have been sustained. If the plaintiff wished to proceed further, he would have had to resort to a separate bill in equity.

Under the present practice, the petitioner's motion for transfer to equity challenged the sufficiency of the respondent's pleadings to raise any issue for trial at law with respect to the release. It was an assertion that the respondent's right to attack the release was exclusively equitable and therefore triable to the judge sitting as chancellor as under the old practice (*Liberty Oil Co.* v. *Condon National Bank*, 260 U.S. 235). The ruling of the District Court granting the motion was similar to a ruling sustaining a demurrer under the old practice. It was a ruling that no legal right to attack the release had been disclosed on the pleadings. Under the old practice, such a ruling would have turned the respondent out of court once and for all. Under section 274b, however, the respondent was given the opportunity to try the issue in equity without the necessity of bringing a separate suit.

In short, if the District Court was correct in ruling that the release could not be impeached at law, then it was only because the respondent's pleadings raised an equitable issue that they had any validity at all; it was only by virtue of section 274b that any question of the validity of the release remained in the case.

The respondent's subsequent disclaimer of equitable relief (R. 36) and its formal declaration that it had no evidence to tender in support of a claim to equitable relief (R. 38) in no way affected or enlarged the respondent's right to attack the release at law. They served merely to defeat its rights in equity.

The respondent suggests that, if it had proceeded to try out the validity of the release in equity, it would have lost its right to object to the transfer and to claim a new trial at law (Respondent's Brief, p. 9). This argument is without foundation. In *Adamos* v. *New York Life Insurance Co.*, 293 U.S. 386, the plaintiff obtained a reversal of the order of transfer and a new trial at law after having proceeded to a full trial in equity under protest.

The respondent also argues that the final decree was improper in that it found the release to be valid without a hearing (Respondent's Brief, p. 16). But the respondent expressly requested the Court to enter a decree upon the same basis as if the case had been set for hearing. In its motion for final decree, the respondent stated (R. 38):

> "3. The plaintiff tenders in equity no evidence in support of any right to relief in equity and now has no such evidence and, therefore, before hearing, announces the conclusion of its evidence in equity in support of any such right in equity, to the same extent and with the same effect as if the court in equity should now have set this case for hearing of evidence against the plaintiff's protest."

Since the respondent expressly asked the Court to enter a decree as if there had been a hearing and as if, at such hearing, the respondent had failed to prove its case by any evidence, the Court had no option but to enter a decree affirming the validity of the release.

We submit, therefore, that the respondent's first point adds nothing to the case. If, as a matter of substantive law, the respondent under its pleadings *could* not impeach the release in a court of law, the fact that the respondent *did* not impeach it in equity served merely to leave the release standing unimpeached and unimpeachable, both at law and in equity.

II.

The respondent's second claim, that the respondent was entitled to jury trial on the question whether the release was under seal, is unsound.

No question as to the existence or sufficiency of the seals was raised in the District Court. The Circuit Court of Appeals ruled that the question could not be raised for the

first time on appeal (R. 72). This ruling is plainly correct.

(*a*) The respondent asserts that it "at all times has insisted on trial by jury" on the question whether a seal existed (Respondent's Brief, p. 18). This is not so. The question of seals was not raised at any time in the District Court. So far from demanding that the issue be tried by jury, the respondent never raised the issue at all.

The only contention advanced by the respondent in the District Court was that it was entitled to jury trial "on the question of the validity of the release" (R. 41), no reference to seals being made either in its bill of exceptions (R. 41) or its assignment of errors (R. 61). The issue of the *validity* of the release presents merely the question whether it was executed under *duress*, this being the only ground of invalidity alleged in the pleadings. That the issue of duress was the only issue which the respondent raised or intended to raise in the District Court by its attack upon the *validity* of the release is illustrated by its own motion for jury issues (R. 31). In this motion the respondent moved that the Court order the framing of a jury issue "upon the issue of the validity of the release executed by the plaintiff" (using the same phraseology as that used in its bill of exceptions, R. 41), and then went on to suggest the following issue: "Was the release dated March 19, 1929 executed by the plaintiff under duress?"

Similarly, in the respondent's motion to rescind the transfer to equity (R. 36-37), where the respondent again asserted its right to jury trial (R. 37), the issue upon which jury trial was demanded did not include any question of seals, but related exclusively to the question of duress (R. 36-37).

The present contention, that the issue of the validity of the release raised in the District Court included an issue as to whether the release was under seal, is plainly unsound. Even if sound, the point should have been raised in the trial court. Where a party does not raise an issue in the

District Court and does not demand jury trial upon it in the District Court, he cannot claim a jury trial for the first time on appeal.

Duignan v. *United States*, 274 U.S. 195.

(*b*) It is well settled that a general finding or ruling imports a determination of subsidiary facts necessary to support it.

United States v. *Winston*, 170 U.S. 522, 526.
National Surety Co. v. *Lincoln County*, 238 Fed. 705, 712-713 (C.C.A. 9).
Treat v. *Farmers Loan & Trust Co.*, 185 Fed. 760 (C.C.A. 2).

The respondent, however, appears to contend that Judge Lowell, upon considering the release itself and in the absence of any contrary evidence (R. 41), could not have found that a sealed instrument was involved. This is plainly unsound. The principal license contract (appearing in the record at pages 42 to 52, and designated "A") contained a full and unqualified release by Raytheon Manufacturing Company, *and this contract was under the seal of all parties, including Raytheon* (R. 52). Raytheon Manufacturing Company is alleged by the respondent to have become the beneficial owner of the claim in suit by an agreement made in 1928 (R. 12-13), a year prior to the execution of the release, and it is also alleged that this action is brought for the exclusive use and benefit of that company (R. 12-13). This release by the real party in interest under its seal (R. 52), being attacked by the respondent, plainly justified (indeed, in the absence of any contrary suggestion, it required) a determination by the Court that a sealed release was involved.

In addition to this release under seal executed by the real party in interest, there is also the supplemental agreement

executed contemporaneously with the principal license agreement. (The supplemental agreement appears at R. 52-54, and is designated "B.") This supplemental agreement contained a clause modifying the sealed release executed by Raytheon Manufacturing Company of Delaware, and also contained a full release by Raytheon, Inc., the actual plaintiff of record. This supplemental agreement exhibits merely the seal of one of the signatories, having no seal affixed opposite the names of the Raytheon Companies (R. 54). But it would make no difference even if this supplemental agreement were treated as not under seal, because the respondent, in order to maintain its action, had to attack, and did attack, not merely this supplemental agreement, but also the principal agreement itself.

The respondent's attempt to distinguish between the fully sealed license agreement ("A," R. 42-52) and the partially sealed supplemental agreement ("B," R. 52-54) overlooks the fact that either agreement is enough to bar this action. If the license agreement, "A," be taken by itself, we have a full and unqualified release by the real party in interest, after it became the owner of the claim, effectively barring the claim.* If the supplemental agreement be taken by itself, we have a modified right to recovery by the real party in interest, but it is a right which cannot be asserted in the present action, for two reasons: (*a*) the supplemental agreement also contains a full release by Raytheon, Inc., the nominal plaintiff, precluding any proceedings in its name, and (*b*) the qualified right of relief granted by the supplemental agreement is limited to a right to obtain a *credit against*

* The respondent for the first time suggests here that it should have been entitled to a jury trial on the question whether this release was intended to cover the claim sued on. Not only was this question not raised below, but it is not open under the pleadings which admit the execution of a release of the claims by "the plaintiff and its Delaware Corporation" (R. 10, 21).

royalties due from the licensee (not Raytheon, Inc., the nominal plaintiff, but Raytheon Manufacturing Company of Delaware) under the original license agreement (R. 53), a form of relief which can be obtained, if at all, only by the licensee in its own name and for its own benefit.

The respondent's case, therefore, involves, not a separate attack upon the releases contained in the partially sealed supplemental agreement, but a general attack upon all the releases together, including the sealed release contained in the fully sealed license agreement (*cf.* pars. 36, 37, 39, and 40 of the Declaration, R. 10-11, 21-22). Accordingly the District Court properly determined that the respondent was attacking a release under seal.

III.

The assertion that the release was executed without consideration is without any foundation whatever.

The chief ground upon which the respondent relies to show the invalidity of the release is that it was executed "without consideration." This assertion is made throughout the brief. It is relied on to prove that the release was oppressive and unfavourable to the respondent (Respondent's Brief, p. 14). It is relied on to show that the respondent may repudiate the release notwithstanding the admitted fact that it has retained and insisted on retaining the benefits received under the license (Respondent's Brief, p. 15). Most of all, it is relied on to establish the fact that the release itself is a contract in aid of a monopoly (Respondent's Brief, pp. 26, 27, 28, 33-34), although the license contract itself is accepted as an entirely fair, proper, and legal agreement (Respondent's Brief, pp. 4, 26).

We are entirely unable to find any basis for this novel claim, which was not made in either of the Courts below and which is entirely unsupported by the record. The respon-

dent alleges, at page 14 of its brief, that it appears *from the declaration* itself that the release was given for nothing. The respondent says:

> "The allegations of the declaration are, in substance, that the defendant . . . for no consideration . . . took away from a competitor . . . upwards of $9,000,000* of capital through the device of compelling that competitor to execute, for nothing, an apparent release of a valid claim for more than that amount . . ."

This is simply not so. The sole charge of invalidity made in the declaration is that the release was executed under duress. It is nowhere suggested that it was obtained without consideration. The most that can honestly be said about the declaration is that it is wholly silent on the point.

At other places in its brief the respondent seems to assert that the absence of consideration for the release is deducible from the release itself. It asserts (without any authority for the statement) that the release had no proper place in a license agreement (pp. 26-27), entirely disregarding the fact that the contract also contained a similar release running from the petitioner to the Raytheon Companies (Supplemental Agreement, sec. 5, R. 53). It also asserts that the royalties paid by the licensee are "the full equivalent of any patent right, if any, used by the licensee;" that in this way "the defendant is compensated fully and in the intended way, for this use and at the defendant's established rate to others;" and that "the plaintiff has paid in full in royalties for the commodity received" (pp. 26-27).

But these are statements of *fact* for which there is not the slightest foundation in any pleading, evidence, or find-

---

* This figure is obtained by trebling the damages which the respondent hopes to recover if it can repudiate its release. It, of course, does not represent capital taken from the respondent on any theory.

ing. The assertion that it was the royalty payments only and not the releases which entered into the consideration for the license is an assertion of *fact;* it is an assertion that the royalty rate was fixed without regard to the fact that the contract also contained releases. But there is nothing in the record to show that such was the fact; there is no indication what the rate of royalty would have been if there had been no releases. The assertion that the royalties were the "full equivalent" of the rights granted, and that by payment of royalties the petitioner has been compensated "fully and in the intended way," is an assertion of *fact;* it is an assertion both as to the *intention* of the parties and as to the *value* of the rights granted. But the record is silent as to the intention of the parties on this point, and it gives no indication of the value of the patent rights granted or its relation to the royalty rate. The assertion that the rate was "at the established rate to others" is an assertion of *fact;* it is an assertion that other similar licenses were granted to other persons on similar terms; and that there was an established rate of royalty for such licenses. But there is no hint in the record with respect to any of these matters; moreover there is no indication whether these unidentified "others" executed similar releases in order to obtain a similar rate of royalty.

Not only are the respondent's assertions thus wholly unsupported by the record, but an examination of the contract in question demonstrates their error. The releases in question are physically a part of the license agreement, an elaborate contract containing mutual promises and grants on both sides. The contract itself indicates that these mutual promises and grants were intended to be interdependent. At the outset of the agreement, it is recited (R. 42):

> "Now, therefore, in consideration of the promises, of the licenses granted herein by the Licensors to the

Licensee and of the mutual covenants herein contained, it is agreed as follows: . . ."

Furthermore, the contract contained a general release from the licensors to the Raytheon Companies in identical language (mutatis mutandis) with the releases given by the Raytheon Companies (Supplemental Agreement, sec. 5; R. 53-54).

Thus it is plain that the license contract and the releases given by the Raytheon Companies were given for abundant consideration. In return for a promise to pay royalties at an agreed rate and releases of claims, the Raytheon Companies received a license and a corresponding release of claims, including claims for past infringement. The respondent insists apparently that it is not bound even to give up this release to it which was contained in the same document. It cannot be assumed that the royalty rate was fixed without reference to the releases, that the releases did not enter into the consideration for the contract, or that the mutual releases were not, at the very least, consideration for each other.

This argument of the respondent's amounts to saying that it is entitled to single out one particular paragraph of a multilateral agreement in which each party agrees to do certain things in consideration of the other's promises, and to claim that this paragraph, taken by itself, is unilateral and therefore without consideration, and hence may be disregarded with impunity. The claim, in other words, is simply that respondent is not bound by those parts of the agreement which impose an obligation upon it, while respondent affirmatively insists on retaining all the benefits conferred by the remainder of the agreement. The same argument appears, under slightly different phrasing, at pages 26 and 27 of respondent's brief, where it is said in substance that any release of an anti-trust claim, no matter

what the other considerations may be which enter into the settlement, is void as against public policy, because it prevents the releasing party from prosecuting his claim to a successful conclusion and thus obtaining cash damages with which to increase his competitive business resources.

It is also significant that the respondent now apparently repudiates the ground upon which the Circuit Court of Appeals decided the case. That Court took the position that "the release . . . enters into and forms an integral part of an agreement alleged to be illegal because establishing a monopoly in restraint of interstate trade" (R. 74).

The error of this theory of the case (see Petitioner's Main Brief, pp. 22-24) is apparently admitted by the respondent, who now expressly concedes that the license contract is a perfectly proper agreement (Respondent's Brief, pp. 4, 26) and bases its whole case on the contention that the release, so far from being an integral part of the license contract, was not a proper part of it at all. For the reasons above given, however, we respectfully submit that this change of front does not improve the respondent's position.

Conclusion.

The petitioner reiterates its assertion that, on the pleadings and on the record, there is no inherent illegality in the license contract or any part of it. The contract itself violates no law. The sole defect charged is that the consent of the Raytheon Companies was improperly obtained by means of the pressure of external circumstances. If these external circumstances involved illegal conduct by the petitioner, then the Raytheon Companies had the right to *rescind* their contract, just as any party who has been improperly or illegally forced to any act may *avoid* it. But this right to rescind does not include the right to retain the benefits of the contract while repudiating the burdens; it does not

include the right, now frankly asserted by the respondent, to enforce the license contract while repudiating the releases. The contract, being an entire contract, must be accepted or rejected in its entirety.

Since a sealed contract is involved, which under the decisions of this Court can be rescinded only in equity; since the contract is not executory, but has been executed; since rights have accrued under the contract, including rights under the decree obtained by the Raytheon Companies enforcing this very contract in the Massachusetts Court; since only a court of equity has the power to untangle the rights of the parties, if, indeed, they can be untangled at all;—for these reasons we submit that the respondent was properly ordered to seek its relief in a court of equity.

Respectfully submitted,

JOHN W. DAVIS,
JOHN L. HALL,
MANTON DAVIS,
CLAUDE R. BRANCH.

TABLE OF CASES

	Page
American Construction Company *v.* Jacksonville, Tampa and Key West Railway Company, 148 U. S. 372, 382, 383	2
American Mills Company *v.* American Surety Company of New York, 260 U. S. 360, 363	9, 10, 11
Buzard *v.* Houston, 119 U. S. 347, 352	11
Cable *v.* United States Life Insurance Co., 191 U. S. 288, 306, 307	10, 11
Continental Wall Paper Company *v.* Louis Voight and Sons Company, 212 U. S. 227	9
Enelow *v.* New York Life Insurance Co., 293 U. S. 379, 383, 385	2, 4, 9, 10, 11
Hamilton-Brown Shoe Co. *v.* Wolf Brothers & Co., 240 U. S. 251, 258	2
Insurance Company *v.* Bailey, 13 Wall. 616, 622	10, 11
Wagner *v.* National Life Ins. Co., 90 Fed. 395, 404	10
Whitehead *v.* Shattuck, 138 U. S. 146, 151	11

SUPREME COURT OF THE UNITED STATES

October Term 1935

No.

RADIO CORPORATION OF AMERICA
Petitioner-Defendant

v.

RAYTHEON MANUFACTURING COMPANY
Respondent-Plaintiff

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

The petition should be denied for several reasons each alone sufficient, namely:—

1. The petition, if ever, should not be granted at this stage of the case.

2. The questions which the petitioner tenders to this Court are not involved in the decision of the Circuit Court of Appeals.

3. The plaintiff is entitled to trial by jury on the fact, which it claims, that this release is not under seal.

4. The enforcement of a release under seal may be denied in a court of law on such facts as are claimed by the plaintiff.

5. No question of general importance is answered wrongly by the Court of Appeals.

1. The Petition, if ever, should not be granted at this stage of the case.

Without doubting the jurisdiction of the Supreme Court or the jurisdiction of the Circuit Court of Appeals, (*Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379, January 7, 1935), the Supreme Court should not exercise its jurisdiction at this stage. The refusal of the lower court to hear the issue of fact without a jury differs from the converse refusal of a jury trial. Such a refusal, in an imaginable case, may violate the Constitution. Granting a trial by jury does not. The Court below, even if it ordered the issue tried in equity, might with right direct an issue to the jury. As it is now, the defendant will admit that it may be so right on the issue, that a jury will decide it in the defendant's favor, so that the moot question of the legal art now tendered to this Court need never be decided. So, in the multitude of worthy petitions, which the imperative demands upon this Court compel it to reject, this is not one to be singled out for favor. No harm is done the defendant, *ipso facto*, by a jury in place of a judge. No harm is done the public interests. The petition is well within the areas marked out by the predictions of this Court, for refusal (*Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258; *American Construction Company* v. *Jacksonville, Tampa and Key West Railway Company*, 148 U. S. 372, 382, 383).

The essential prematurity of this petition is emphasized by the contested statements in the petition and in the supporting brief as to the questions which will arise hereafter in the trial of the case and on which the petitioner desires the preventive advisory opinion of this Court. Many of the contentions imputed to the plaintiff, are not made and will not be made by the plaintiff.

2. The questions which the Petitioner tenders to this Court are not involved in the decision of the Circuit Court of Appeals.

The plaintiff has not asked relief in equity from a release valid at law. On the contrary, the plaintiff has disclaimed any such relief (R. 37 last line to 38 line 14; Opinion R. 71 line 4, line 18). The petition and supporting brief make no mention of this.

The plaintiff says (not that a monopolizing corporation is an outlaw for which a court will not enforce a contract —but—) that "it is contrary to public policy for a court of *law* of the United States to assist a wrongdoer to carry out his plot to restrain commerce and obtain a monopoly by enforcing for the wrongdoer a release obtained by the duress upon the releasor of the illegal monopoly which the release has created; it is not that the releasor seeks the assistance of a court to cancel the release; it is that the release is initially void" (Plaintiff's Brief in C.C.A. p. 6; Opinion R. 80 line 28, 81 lines 8 and 24, 82 line 2; Declaration par. 35-40, R. 21, 22). The plaintiff alleged at law that the purported release was void at law (not voidable in equity).

If contrary to the plaintiff's contentions, the release is enforcible at law, the defendant needs no assistance from equity. The plaintiff asks none.

The sufficingly decisive parts of the opinion of the Circuit Court of Appeals are that "no equitable relief is sought" (R. 75 line 34); "Neither does it follow that an order transferring the case from law to equity against the protest of the plaintiff can be sustained when no affirmative equitable relief is sought" (R. 78 line 20).

The only jurisdiction of the Circuit Court of Appeals, was based on the fact that the order of transfer was essentially the grant by a court of equity of an inter-

locutory injunction in equity to the defendant against the plaintiff to prevent the plaintiff from attacking the release (R. 75 line 1; *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379, 383). There was no equitable jurisdiction because the defendant had a plain adequate and complete remedy at law in that by the premise of its whole argument, the plaintiff is not permitted to attack the release, at law. If the defendant is right, either the attacking evidence will be excluded or the jury will be instructed that notwithstanding the evidence the release is to be enforced, or both.

3. The Plaintiff is entitled to trial by jury on the fact, which it claims, that this release is not under seal.

The plaintiff did not allege that the release was under seal (Declaration par. 36, 37; R. 21, 22). The answer alleged that it was under seal (R. 29) and that it was an integral part of the license granted to the Raytheon Manufacturing Company (R. 33 lines 2 and 23; R. 34 line 22) of Delaware. In Massachusetts practice, applied under the Conformity Act, the defendant's allegation of a seal is deemed denied without the need of a replication (Massachusetts General Laws (Ter. Ed. 1932) Ch. 231 sec. 34).

The plaintiff, the Massachusetts corporation, has never given a release under seal. The only release under seal and the only release which was "an integral part of the license" was one given by the Delaware corporation (R. 43, 51, 54). The plaintiff signed another agreement which contained words of release (R. 55), not under seal and not purporting to be under seal and professing no intention to become a sealed instrument (R. 54, 56). This second paper has on it the corporate seal of the General Electric Company. It has no other seal (R. 77 line 28). It has no words of adoption. It does not appear that the seal of the General Electric Company was on it when the name of the Massachusetts corporation, Raytheon Incorporated, was affixed. It does not appear that the purported signature "D. T. Schultz, Asst. Treas." (R. 56) was affixed by anyone with authority to execute a sealed instrument.

The record contains no finding that the plaintiff has executed a release under seal. Each of the two documents, one under corporate seal, signed by the Delaware corporation (R. 43-54) and one not under seal, bearing

the names of both the Delaware corporation and the Massachusetts corporation (R. 56) contains words of release (R. 51, 55).

The plaintiff has persisted always in the denial that the Massachusetts corporation executed any release under seal.

The order of the District Court to transfer to equity (R. 31 line 35) is silent as to whether the court deemed that (1) the sealed instrument which was an integral part of the license was effective because the Delaware corporation was the beneficial owner of the claim and so could release it, or (2) the unsealed agreement of both corporations became their sealed instrument because theretofore or thereafter the General Electric Company affixed its corporate seal, or (3) the validity of the release should be tried in equity whether or not under seal. It does appear that the court decided on the pleadings and without evidence (R. 42 line 22).

Later, the District Court in equity made findings of fact (R. 40, 41) but none as to which paper was the one on which the decree was based or whether it was under seal. No evidence was introduced (R. 72 line 13).

The Court of Appeals says: "Whether the adoption of a seal affixed by another person is a question to be determined by extraneous evidence when there is nothing in the final wording of the instrument indicating that the parties 'have hereunto set their hand and seal' raises a rather delicate question but one which we do not find it necessary to determine" (R. 77 lines 35 to R. 78 line 5). The Court for the purposes of decision assumes that without evidence the judge of the district court treated the release as under seal and that plaintiff's counsel raised no question to the contrary. It is respectfully submitted that the record does not warrant this assump-

tion. It became unimportant in view of the right decision of the Court of Appeals that no relief in equity was sought (R. 75, 78).

If the release on which the defendant relied was that which was an integral part of the license given by the defendant to the Delaware corporation, this purported to be under seal. This was the only paper which purported to be sealed by the Raytheon Manufacturing Company of Delaware or of Massachusetts. This was the only release described by the only answer (R. 29) which had been filed when the case was transferred to equity. This was the only paper which contained more than one seal. The answer said nothing about any seal by adoption (R. 29). When the motion for transfer was filed it charged that the plaintiff had adopted the "seals" of the other parties who signed the release (R. 30 line 16). This could mean only the paper that had "seals" on it. The only such paper was the license (R. 53, 54, 56). The amended answer filed six weeks after the transfer to equity (R. 32) alleged that the release on which the defendant relied was the one which "constituted an integral part of the license granted by the defendant to the Raytheon Manufacturing Company" (R. 33 line 2). This paper bore seals. To all appearances, the defendant was taking the position that the virtual plaintiff, the Delaware corporation, the owner of the cause of action and for whose benefit the Massachusetts corporation as plaintiff of record brings this action had released under seal by the only release which was an integral part of the license.

It appeared in the Court of Appeals that what the defendant relies on was not the release with seals and which is an integral part of the license but the agreement not sealed by the plaintiff (R. 77 line 29).

CONTENTS OF BRIEF

	PAGE
1—The petition, if ever, should not be granted at this stage of the case	2
2—The questions which the petitioner tenders to this Court are not involved in the decision of the Circuit Court of Appeals	3
3—The plaintiff is entitled to trial by jury on the fact, which it claims, that this release is not under seal	5
4—The enforcement of a release under seal may be denied in a court of law on such facts as are claimed by the plaintiff	9
5—No question of general importance is answered wrongly by the Court of Appeals	13

If a seal is important, nothing has occurred to deprive the plaintiff of the right to trial by jury as to the fact whether the plaintiff (1) adopted the corporate seal of the General Electric Company, (2) ever knew that such a seal had been or was to be put on the paper, (3) ever authorized its name to be affixed to a sealed instrument by an assistant treasurer (R. 56), (4) ever understood or had any reason to understand that the paper was a sealed instrument. No evidence has been heard on these questions even by a judge without a jury. They are all questions of fact and not of law.

The defendant made the affirmative allegation of a seal. The plaintiff denied it. Before the plaintiff may be deprived of a jury trial of the issue of initial voidness and unenforcibility, if that deprivation is to be based on the fact that the paper purporting to be signed by the plaintiff (R. 56) is the plaintiff's sealed instrument, the plaintiff is entitled to a trial by jury on the issue of seal or no.

4. The enforcement of a release under seal may be denied in a court of law on such facts as are claimed by the Plaintiff.

The conflict of authority in the Circuits which the petitioner describes is a thing of the past. This Court on December 11, 1922, removed it by its opinion in *American Mills Company* v. *American Surety Company of New York*, 260 U. S. 360, 363. The decision in *Enelow* v. *New York Life Insurance Co.* (January 7, 1935), 293 U. S. 379, 388, reaffirms this position. Theretofore some courts had held that an instrument under seal could not be defeated at law for duress or fraud inducing its execution. Even these courts had not gone so far as to say that a court of law must enforce an instrument under seal where it would offend public policy by lending the court's assistance to the furtherance of a plot to monopolize. A court of law is not obliged to become an accessory to a crime.

In the case at bar, the plaintiff alleges that the release is itself a part of the plot and that its enforcement will assist in the very monopolizing of all tributeless tube selling which the defendant set out to bring about. If the plaintiff can prove these allegations, a court of law will not assist the defendant to enforce the release (*Continental Wall Paper Company* v. *Louis Voight and Sons Company*, 212 U. S. 227).

The question proposed by the petitioner (Petitioner's Brief pp. 21, 22) whether a claim for damages caused by monopoly or restraint may be satisfied and effectively released is not presented by the pleadings and may never arise in the case. No such question was decided or even discussed by the Court of Appeals (R. 80-82).

For these reasons, the simple question whether a release under seal, obtained by duress can be attacked in equity only, is not presented in the case at bar. If it were, the

result would be the same. Those earlier decisions holding that duress or fraudulent inducements are not a defense at law make no distinction between releases and other instruments under seal. It is established now by the opinion in *American Mills Company* v. *American Surety Company of New York*, 260 U. S. 360, 363, and confirmed by the decision in *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379, 383, that an instrument under seal may be attacked at law for duress or for fraudulent inducements to its execution, if they are of such a nature that the instrument had no validity from the outset and that no return of consideration or other act on the part of the ostensible releasor is a condition precedent to avoidance.

In the American Mills Company case, the Court by Mr. Chief Justice Taft, speaking of a bond under seal (same case 273 Fed. 67), said: "It is conceded by the respondent that its bill in equity in the District Court should have been dismissed because it had an adequate remedy at law. The case of *Insurance Co.* v. *Bailey*, 13 Wall. 616, 622, and *Cable* v. *United States Life Insurance Co.*, 191 U. S. 288, 306, 307, settle that." It was this Chief Justice who as Circuit Judge in 1898 in *Wagner* v. *National Life Ins. Co.* (C. C. A. 6th) 90 Fed. 395, 404, had written the opinion of the court that: "Our conclusion is, therefore, that it is proper in a suit at law for the plaintiff to meet a plea of release by a replication that the release was obtained by fraud, whether the fraud is in the execution, or in misrepresentation as to material facts inducing execution. We are glad to come to this conclusion, because it avoids circuity of action, and thus facilitates the administration of justice." In this opinion no distinction is made between a release not under seal and a release under seal.

Enelow v. *New York Life Insurance Co.*, 293 U. S. 379, 383, shows that no distinction is to be made, in this respect, between a contract not under seal and a contract under seal. In either case, the attack is at law and not in equity.

The test is whether the attack upon the release is on grounds which put it unconditionally out of legal existence.

Buzard v. *Houston*, 119 U. S. 357, 352, dictum.

If so the plaintiff cannot maintain a bill in equity to set the specialty aside because there is no jurisdiction in equity, as the remedy at law to hold the release no bar, is plain, adequate and complete.

Enelow v. *New York Life Insurance Co.*, (1935) 293 U. S. 379, 383.

American Mills Company v. *American Surety Company of New York*, (1922) 260 U. S. 360, 363, Dictum.

Cable v. *United States Life Insurance Co.*, (1903) 191 U. S. 288.

Insurance Company v. *Bailey*, 13 Wall. 616.

Buzard v. *Houston*, 119 U. S. 347, 352, Dictum.

Whitehead v. *Shattuck*, 138 U. S. 146, 151, Semble.

This year, in *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379, 385, the Court by Mr. Chief Justice Hughes said: "In such a case, the defense of fraud is completely available in the action at law and a bill in equity would not lie to stay proceedings in that action in order to have the defense heard and determined in equity . . . The decree of the Circuit Court of Appeals is reversed and the action is remanded to the District Court with direc-

tion to vacate its order for a hearing in equity and to proceed with the trial of the action at law." In the case at bar, the Court of Appeals was right in giving the same direction to the District Court (R. 84).

5. No question of general importance is answered wrongly by the Court of Appeals.

The solemnity of a drop of wax or of the mucilage under a red paper disc on an enforcible contract, no longer does arouse the high degree of interest in courts of justice, which it once did. Their energy can be expended more wisely than in reviving this interest. The Constitution does not compel the curtailment of trial by jury.

Respectfully submitted,

EDWARD F. McCLENNEN
E. CURTISS MOWER, JR.
EDWARD WILLIAMSON
Attorneys for Respondent

TABLE OF CONTENTS

		Page
Grounds of Error		2
Statement of the Case		2
First:	As neither the plaintiff nor the defendant set up an equitable right or asked for an equitable remedy in this action at law, nothing should have been transferred to the equity side of the court	12
Second:	If a plaintiff's seal on the release on which the defendant relies prevents a court of law from holding it void of force in a court of law, the plaintiff is entitled to trial by jury as to whether the release on which the defendant relies was sealed by the plaintiff	18
Third:	A release under seal may be held void for enforcement by a court of law on the facts alleged by the plaintiff and not yet heard by any court	24

TABLE OF STATUTES

	Page
U. S. Code, Title 28, s. 347 (Jud. Code, s. 240 as amended)	1
U. S. Code, Title 15, c. 1, s. 15	2
c. 1, s. 1, 2, 14	2
Mass. Gen. Laws (Ter. ed. 1932), c. 231, s. 34	22, 24

TABLE OF CASES

	Page
A. B. Small Co. *v.* Lamborn & Co., 267 U. S. 248	34
Adamos *v.* N. Y. Life Ins. Co., 293 U. S. 386	29
American Mills Co. *v.* American Surety Co. of N. Y., 260 U. S. 360	30, 31, 32
Barnet *v.* Abbott, 53 Vt. 120	21
Cable *v.* U. S. Life Ins. Co., 191 U. S. 288	30, 33
Columbia Pictures Corp. *v.* Bi-Metallic Inv. Co., 42 F. (2d) 873	26, 34
Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540	34
Continental Wall Paper Co. *v.* Voight & Sons Co., 212 U. S. 227	28, 34
Dennehy *v.* McNulta, 86 Fed. 825	34
Enelow *v.* N. Y. Life Ins. Co., 293 U. S. 379	2, 29, 30
Ex parte Skinner & Eddy Corp., 265 U. S. 86	9
Fidelity & Casualty Co. of N. Y. *v.* Glenn, 3 F. (2d) 913	32
Fox Film Corporation *v.* Muller, 255 N. W. 845; 260 N. W. 320, 55 Sup. Ct. Rep. 924	26
Gasoline Products Co., Inc. *v.* Champlin Refining Co., 46 F. (2d) 511	34
George *v.* Tate, 102 U. S. 564	31
Hess's Estate, 150 Pa. State, 346	21
Insurance Co. *v.* Bailey, 13 Wall. 616	29, 32

TABLE OF CASES (continued)

	Page
Jacksonville &c Railway *v.* Hooper, 160 U. S. 514	20
Life Insurance Co. *v.* Bangs, 103 U. S. 780	29
Maryland *v.* Humbird, 54 Md. 327	21
N. Y. Life Ins. Co. *v.* Marshall, 23 F. (2d) 225	30
N. Y. Life Ins. Co. *v.* Miller, 73 F. (2d) 350	30
Raytheon Mfg. Co. *v.* Radio Corp. of America, 76 F. (2d) 943	1
Small, A. B. Co. *v.* Lamborn & Co., 267 U. S. 248	34
Starita Co., C. F. Inc. *v.* Compagnie Havraise Peninsulaire de Navigation a Vapeur, 52 F. (2d) 58	19
Steele *v.* Drummond, 275 U. S. 199	27
Union Pacific Ry. Co. *v.* Harris, 158 U. S. 326	32
Union Pacific R. R. Co. *v.* Public Service Com'n of Missouri, 248 U. S. 67	29
Wagner *v.* National Life Ins. Co., 90 Fed. 395	31, 32
West *v.* Camden, 135 U. S. 507	34
Wilder Mfg. Co. *v.* Corn Products Co., 236 U. S. 165	34
Woodstock Iron Co. *v.* Richmond and Danville Extension Co., 129 U. S. 643	34

SUPREME COURT OF THE UNITED STATES

October Term, 1935.

No. 127.

RADIO CORPORATION OF AMERICA,
Petitioner-Defendant,

v.

RAYTHEON MANUFACTURING COMPANY,
Respondent-Plaintiff.

BRIEF FOR RESPONDENT-PLAINTIFF

This case is before this Court under *United States Code*, Title 28, section 347 (*Judicial Code*, section 240 as amended) on a petition filed on June 14, 1935, granted on October 14, 1935, to determine the correctness of the final decree entered on February 19, 1934 in the District Court of the United States for the District of Massachusetts (R. 39) and the proceedings leading thereto, ordered vacated on April 8, 1935 by the final decision of the Circuit Court of Appeals for the First Circuit (R. 76—76 F. (2d) 943), on which mandate has been stayed.

The respondent-plaintiff Raytheon Manufacturing Company submits that the District Court was in error and was so held rightly by the Circuit Court of Appeals, because: —

(1) As neither the plaintiff nor the defendant set up an equitable right or asked for an equitable remedy in this action at law, nothing should have been transferred to the equity side of the court;

(2) If a plaintiff's seal on the release on which the defendant relies prevents a court of law from holding it void of force in a court of law, the plaintiff is entitled to trial by jury as to whether the release on which the defendant relies, was sealed by the plaintiff;

(3) A release under seal may be held void for enforcement by a court of law on the facts alleged by the plaintiff and not yet heard by any court.

STATEMENT OF THE CASE

The first and underlying error but not the only error, it is respectfully submitted, in the District Court was the allowance on November 8, 1932 (R. 30) of the defendant's motion to transfer the case to equity for a preliminary hearing on the issue of the validity of the release executed by the plaintiff (R. 28).

It is assumed without further argument that the Circuit Court of Appeals had jurisdiction, before the final judgment in the action at law, to consider this error, as decided in *Enelow* v. *N. Y. Life Ins. Co.*, 293 U. S. 379.

On December 14, 1931, the plaintiff Raytheon Manufacturing Company, a Massachusetts corporation, become by change of name, Raytheon, Inc., and incorporated, also, as a Delaware corporation, brought and entered this action at law (R. 2), to recover under *U. S. Code*, Title 15, c. 1, s. 15, the sum of $15,000,000 from the defendant Radio Corporation of America for treble the damages sustained by the plaintiff from a violation of the *Anti-trust Laws of the United States*, sections 1, 2, and

14, of that chapter, on a cause of action, wholly accrued to the Massachusetts corporation before May 28, 1928, which became on that date the property of the Delaware corporation, for whose benefit the action was brought (R. 12).

The declaration alleged that prior to 1926, the defendant and others formed a combination and conspiracy in restraint of trade and an attempt to monopolize, a monopolization, a combination and conspiracy with others to monopolize trade in violation of sections 1 and 2, and as a part thereof, in violation of section 14, the making of leases and contracts on condition that the lessee or licensee shall not use or deal in goods of competitors (R. 4, 14).

After alleging the cause of action complete in the early part of 1928 (R. 10, 20) and in order to render pertinent, decrees and transactions between the defendant and third parties otherwise impertinent as *inter alios acta*, the plaintiff alleged the fact that the plaintiff and its Delaware corporation had been compelled by the defendant to execute a "void" release and that "the plaintiff has never executed a valid release of said claim" (R. 10, 21, par. 37). The defendant-petitioner invents three descriptions of these allegations which, it is respectfully submitted, are unfounded. (1) This is not an allegation of a release voidable because of economic pressure. It is an allegation of a release void, not merely because of economic pressure but because of the exercise of an illegal power to compel the plaintiff to give up, for nothing, more than $9,000,000. (2) It is not an anticipatory replication setting up, by short cut, a prayer in equity for cancellation of the release. It is only a necessary introduction to the next allegations. It is made for that purpose, only. The carefulness of the draughtsman

of the declaration as a whole, indicates that if an application for equitable relief of cancellation had been intended it would have been stated. (3) There is no allegation that the license at the defendant's established rate of royalty was void or voidable. It is the release given for nothing which is alleged to be void.

The plaintiff next alleged that about March 19, 1929, at the time of the execution of the void release the defendant agreed with the plaintiff, that, notwithstanding the release, if any other claimant for damages, resulting from the unlawfully conditioned licenses which had then been enjoined preliminarily, by the District Court of the United States for the District of Delaware, shall obtain a pecuniary recognition of its claim in consequence of judgment or agreement of settlement or otherwise, the plaintiff shall become entitled to assert its claim for damages notwithstanding the release to an amount up to the largest amount obtained by any other claimant and that the defendant shall not be entitled to plead the release as a bar (R. 11, 21).

The plaintiff next alleged that the defendant had in September or October, 1931, accorded to a claimant such pecuniary recognition in not less than $1,600,000 and past royalties in addition, so that the plaintiff was entitled to recover not less than $1,600,000 and the amount of remissions of royalties even if the release were valid, and that as it was void the plaintiff was entitled to recover not less than $3,000,000 trebled to not less than $9,000,000 (R. 22).

It is noteworthy that the declaration does not allege that either the release or the contemporaneous agreement was under seal. It does not allege that there was any invalidity in the license or in the contemporaneous agreement. It does allege that the release is void and that the

plaintiff has never executed a valid release of the claim (R. 10, 21).

It is noteworthy that the plaintiff does not allege any right in equity to be relieved from the legal effect in a court of law, of this void release.

The defendant in answer denied all the plaintiff's allegations and alleged, affirmatively, that on or about March 19, 1929 the plaintiff had released the defendant from all claims, for a good and valuable consideration, and that the release was under seal and was not executed under duress (R. 28). Manifestly, this was an allegation of a legal bar at law, in a court of law, to any recovery by the plaintiff.

The defendant alleged no equitable right and no right to relief in equity. The defense of release was pleadable as a bar at law before defendants were given any right to plead equitable defences at law.

The answer did not make profert of the release or set it out by copy.

On October 10, 1932, the defendant filed a motion to have the case transferred from the law side to the equity side of the court for a preliminary hearing upon the issue of the validity of the release executed by the plaintiff.

It is noteworthy that this was an application by the defendant to have a court of equity determine the validity of a legal bar which the defendant had set up.

On November 8, 1932, Judge Lowell, sitting in the Motion Session, allowed this motion (R. 30). He heard no evidence (R. 41). He inspected "the release referred to in the motion". What he inspected was two papers, one a formal license and the other an informal memorandum (R. 42, 52).

The formal license (R. 42) was a license by the defendant and others to the Delaware corporation. It

contained a general release by that corporation (R. 50, section 2). The Massachusetts corporation is not a party to that release. The paper asserts that the parties have affixed to it their corporate seals. Seals appear as affixed (R. 52).

The informal memorandum (R. 52) did not state who were the parties to it. It contained a clause that notwithstanding the release, the licensee shall still be entitled to assert its claim for damages arising from the operation of the alleged unlawful condition in prior licenses, which had been enjoined, if other such claimants obtain pecuniary recognition for such claims (R. 53). It then contained a clause that the licensee and the plaintiff Raytheon, Inc. jointly and severally release the licensors from all liabilities. The claim in suit was then the property of the licensee, the Delaware corporation and no longer the property of the Massachusetts corporation. It was the only claim arising from the cause described, which the Delaware corporation had.

The paper contains nothing to suggest that it is to be sealed, or that it is to have the effect of a sealed instrument, or that it ever has been sealed by the plaintiff or by the defendant. It bears a seal of the General Electric Company. The name Raytheon, Inc. appears as if affixed by D. T. Schultz, Asst. Treas. (R. 54).

At the hearing on the motion the plaintiff claimed that the plaintiff was entitled to trial by jury on the question of the validity of the release (R. 71). This meant its validity at law. If a seal made the release incontestible at law, this was a claim for jury trial on the issue whether or not the plaintiff had sealed the release.

The record does not indicate whether Judge Lowell granted the motion (1) because of an opinion that the release by the Delaware corporation contained in the

license purporting to be sealed, was operative to release the claim of the Massachusetts corporation of which the Delaware corporation was the owner, or (2) because he was of opinion that the unsealed contemporaneous memorandum was an unattackable bar at law, or (3) because he was of opinion that this unsealed memorandum was deemed to be sealed by the plaintiff because the General Electric Company had sealed it, or (4) because he was of opinion that it was to be deemed sealed by the plaintiff because it was contemporaneous with the license to which the plaintiff was not a party, or (5) because of some other reason. No evidence had been offered that the plaintiff, as alleged in the motion, had adopted the seals of the other parties who signed the release (R. 41, 29). There was no evidence that D. T. Schultz, whose name appeared on the paper (R. 54), had any authority to seal an instrument for the plaintiff, or to adopt a seal for the plaintiff (R. 41).

On April 4, 1933, Judge Lowell denied a motion, made by the plaintiff, without waiver of its objections to jurisdiction, for the framing of an issue to be tried by the jury (R. 35, 31).

On January 3, 1934, the plaintiff expressly disclaimed any right or remedy in equity to be relieved from such operation as the release would have at law had there been no duress (R. 36). The plaintiff alleged that the issue as to duress was whether the purported release was obtained in fact by duress of a power obtained by the defendant by unlawfully restraining interstate trade and substantially lessening competition therein in violation of sections 1, 2, and 14, and, if so, whether a court of law, not equity, of the United States will adjudge originally valid a release so obtained notwithstanding such duress (R. 37). The plaintiff alleged that a court of equity was

without jurisdiction to try the issues when presented in an action at law in which neither party claims an equitable right or seeks an equitable remedy. The plaintiff reiterated a claim to a right to trial by jury on this issue, which arises in an action at law (R. 37). The plaintiff moved the court to rescind or to vacate or to supersede the order of transfer to equity (R. 36). Without hearing evidence (R. 55), this motion was denied (R. 38).

On February 12, 1934, the plaintiff, still insisting on its objection to the jurisdiction and to the order of transfer, filed a motion by which, "The plaintiff hereby discontinues, becomes nonsuit and dismisses before any hearing in equity any and all allegations and claims that in equity the release alleged in the plaintiff's declaration and in the defendant's motion for transfer is invalid in equity more than at law and that the plaintiff has any equitable right to a decree declaring said release invalid, or to any relief in equity." (R. 38). Plaintiff admitted that it had no right in equity or to any remedy therein because it had a plain, adequate and complete remedy at law, in that a court of law will not give force or effect to a release obtained in the manner alleged and having, if enforced, the unlawful effect alleged (R. 38). The plaintiff alleged that it "tenders in equity no evidence in support of any right to relief in equity and now has no such evidence and, therefore, before hearing, announces the conclusion of its evidence in equity in support of any such right in equity, to the same extent and with the same effect as if the court in equity should now have set this case for hearing of evidence against the plaintiff's protest. This suit in equity is now before hearing ripe for final disposition." (R. 38).

On the basis of these allegations the plaintiff moved for a final decree dismissing said suit in equity for the

reasons aforesaid or terminating said suit in equity in such manner as in this state of the record equity requires and thereupon returning the papers originally filed in law to the court of law.

It is well established that a party suing for relief in equity may as of right dismiss his application before any proceedings thereon have taken place, in equity.

Ex parte Skinner & Eddy Corp., 265 U. S. 86, 93.

On February 19, 1934, Judge Brewster heard this motion without the introduction of evidence (R. 56). The plaintiff urged that *the plaintiff could not try the question of fact in equity and at the same time save the right to try it over again before a jury* (R. 56), and that no decree could be entered against the plaintiff (R. 57) beyond dismissal.

Thereupon, the defendant became the actor and asked the court to enter, not a decree that there was in fact no equitable defence to the release, but a final decree adjudging the release to be valid and binding (R. 58, 60). The plaintiff objected to the change to the decree presented by the defendant from the decree sought by the plaintiff's motion (R. 60).

Thereupon, on February 19, 1934, over the exception of the plaintiff, the court entered the final decree drawn by the defendant, which recited that the case had come on to be heard upon the issue of the validity of the release executed by the plaintiff (R. 40). There had been no hearing on that issue. It adjudged that the release set forth in the defendant's answer and in the defendant's motion to transfer the case to equity, and described in paragraphs 36 and 37 of the plaintiff's declaration, is valid and binding (R. 40). It ordered the case back to

law for further proceedings in accordance with this decree (R. 40). Paragraphs 36 and 37 of the declaration are those which describe the release and not the license. They are not the one which describes the informal agreement made at the same time. That is set out in paragraph 39 (R. 11, 21). The answer alleged a release under seal. By implication, it referred to a document which bore the seal of the plaintiff. As there was no profert or copy, the release alleged was not defined in the answer. The motion for transfer referred not to any license, but to the void release alleged in paragraphs 36 and 37 of the declaration, and not to the informal agreement in paragraph 39. The motion said that the release was under seal in that the plaintiff adopted the seals of the other parties who signed the release. This must mean the formal license to which the nominal plaintiff was not a party. The informal agreement did not have seals upon it (R. 54). It appeared to bear the one seal of the General Electric Company and no others. The formal license appeared to bear four seals of the only four parties named in it as parties (R. 52, 42).

The record throws no further light on whether the final decree means that the only paper bearing seals, and which bears the name of the Delaware corporation and not that of the plaintiff, is valid and binding upon the plaintiff because the plaintiff is suing for the benefit of the Delaware corporation, the owner of the claim, or whether the court has adjudged that the informal agreement not bearing seals but bearing the name of the plaintiff, is valid and binding. The distinction may prove to be important, because the defendant-petitioner made the unconscionable contention in its brief in support of its petition for certiorari (p. 23) that the distinction should be so far maintained between the nominal plain-

tiff, the Massachusetts corporation, and the virtual plaintiff, the Delaware corporation, whose property the claim was, that the virtual plaintiff who owned the claim would be barred by the release signed by the nominal plaintiff but could not have the reserved rights for upwards of $1,600,000 because the reservation did not refer to this claim for damages although it was then owned by the virtual plaintiff, the Delaware corporation (R. 12).

If this unconscionable contention was sound, as it is submitted that it is not, this action of the Delaware corporation in the name of the Massachusetts corporation would be at an end without any evidence ever having been heard on any subject of claim or defence. The result would be accomplished in an action at law without trial by jury and without waiver thereof.

On April 8, 1935, on appeal to the Circuit Court of Appeals, that court decided that the plaintiff sought no equitable relief and that the release was set up as a defence in the action at law (R. 70, lines 26-27), and that even if the release was treated as a document under seal, "Neither does it follow that an order transferring the case from law to equity against the protest of the plaintiff can be sustained when no affirmative equitable relief is sought." (R. 72, lines 34-37), and that, "We hold that the validity of the contract is the primary issue to be tried and that it raises a mixed question of law and fact entitling the plaintiff to a trial by jury. The order transferring the action at law to equity filed November 8, 1932, cannot be sustained." (R. 75, lines 32-34). Accordingly, the court decided that the several orders should be vacated and the case remanded to the District Court.

FIRST

AS NEITHER THE PLAINTIFF NOR THE DEFENDANT SET UP AN EQUITABLE RIGHT OR ASKED FOR AN EQUITABLE REMEDY IN THIS ACTION AT LAW, NOTHING SHOULD HAVE BEEN TRANSFERRED TO THE EQUITY SIDE OF THE COURT.

In its petition for certiorari (p. 3) and in its brief now filed, the defendant alleges as the only statute involved, section 274 (b) of the Judicial Code which is there quoted as follows: — "In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require." (p. 3.)

If the writ of certiorari in this case was granted in reliance on the assertion that this is the statute involved, it is respectfully submitted that it was granted through a misapprehension.

The only "answer, plea, or replication" which sets up the defence of a release, is the defendant's answer (R. 28). It sets the release up as a legal bar. If it is a valid bar, it is because of its operation at law. The defendant does

not require any assistance from a court of equity to have a court of law apply that defense.

The plaintiff has not claimed any right to relief in equity from the legal effect of the release. The plaintiff's declaration contains no such request (R. 10, 21). The allegations concerning the release, in the declaration are not in anticipation of a defence. They are made as a necessary introduction to the allegations which follow them, of facts which otherwise would be irrelevant, which show that the plaintiff is entitled to a recovery in a limited amount even if there is a valid release. Paragraph 39 of the declaration (R. 10, 21) would be unintelligible without a prior allegation of a release. The allegations of paragraph 39 allege a parole agreement and not a specialty.

As it was necessary to allege the release as an introduction to the allegations of paragraph 39, those allegations were made. If the release had been alleged without an allegation that it was invalid at law, it might have been argued that the allegation implied a release valid at law. The allegation that the release is void at law is to prevent such an argument. The words, "at law" were not used because they were unnecessary. This was a declaration in an action at law. The plaintiff did not say that the release was valid at law, but avoidable in equity. The plaintiff did not ask to have the release avoided. The plaintiff alleged that it was "void". A release which although avoidable in equity, is an unattackable bar at law, is not void. The allegations are that the release is "void", and that "the plaintiff has never executed a valid release of said claim" (R. 10, 21).

It is immaterial in the present discussion whether or not the plaintiff can prove these allegations. They are the allegations which the plaintiff has made in a court

of law. They have not been tried. They contain no intimation that the plaintiff seeks relief in equity from a release valid at law.

The defendant argues that a release procured by duress is voidable and not void. It is submitted that on the facts alleged in this declaration this particular release started out absolutely void. However, it is unnecessary to pursue this argument, because the plaintiff has alleged that the release is, not voidable but, "void", and that "the plaintiff has never executed a valid release of said claim". If the plaintiff cannot prove that it never has executed a valid release, this is not a reason for sending the plaintiff into equity.

The brief for the petitioner-defendant calls attention to the rule that allegations of mere conclusions of law not supported by allegations of fact are not admitted on demurrer. That brief also asserts that "'there is an entire absence of anything to show that in practical operation this contract was not entirely favourable and fair to the licensee.'" (p. 15) The allegations of the declaration are, in substance, that the defendant conspired to monopolize this commerce in all kinds and parts of radio communicating devices, and that pursuant to that conspiracy and for no consideration it took away from a competitor in this commerce upwards of $9,000,000 of capital through the device of compelling that competitor to execute, for nothing, an apparent release of a valid claim for more than that amount, after it had first completely destroyed that competitor's business at a time when it then had a present value in excess of $3,000,000 and an established net earning power in net profits of $454,935 a year (R. 4, 15): If these be not allegations that this contract "was not entirely favorable and fair to the licensee" the art of pleading is becoming refined at the expense of strength.

If it were important to argue the question, it is noteworthy that this is not a case where an act of avoidance by the plaintiff was necessary. There was no consideration for the plaintiff's alleged release. There was no consideration to return, to perfect avoidance. The defendant's unlawful power has never ceased. The release was as void at the beginning as it could ever become or as any act of the plaintiff's could make it. But this is all apart from the matter under discussion.

If it is the law, which the plaintiff submits that it is not, that the release cannot be attacked in a court of law on the facts alleged by the plaintiff, such is the law, without the interposition of a court of equity. The court of law is all-powerful to apply it. The court of law does not need the help of a court of equity. The defendant does not need the help of a court of equity. The plaintiff does not ask the help of a court of equity and declined to have that help thrust upon it.

To make it emphatic that the plaintiff did not ask to be relieved by equity from a defense good at law, the plaintiff disclaimed of record any such attempt (R. 36, lines 30-31; R. 38, paragraph marked 1).

When the defendant in its petition for certiorari at page 3, cited the above-quoted section 274(b), it intimated that somebody by answer, plea, or replication, had set up a short-cut bill in equity in a pleading at law. The petition and supporting brief is silent as to who had brought that short-cut bill in equity.

No one had.

The plaintiff's allegation in a court of law to a court of law for trial by a court of law is, that the release is void at law and that the plaintiff has executed no release valid at law. When it comes to a trial before a judge and jury at law, if the plaintiff cannot maintain these

allegations the plaintiff will have failed to prove the plaintiff's allegations. Whether that is because it has not evidence sufficient to convince a jury, or because a court of law will not permit that evidence to be introduced or will not permit the jury to pass upon it after it has been introduced, are questions which the court of law at the trial can decide, without the need of any help from a court of equity.

Because the plaintiff unequivocally alleged only its rights at law and the defendant unequivocally alleged only its rights at law, no use has been made of section 274(b) permitting an equitable defense in an answer, plea, or replication, and there was nothing which could be transferred to a court of equity or of which a court of equity had any jurisdiction.

The gravity of the error into which it is submitted that the defendant has led the District Court, is that when that court had no jurisdiction in equity it has adjudged (R. 40) that the case came on to be heard "on the issue of the validity of the release" when in fact it came on to be heard on the plaintiff's motion to dismiss before hearing (R. 37), and has never come on to be heard on the issue of the validity of the release, and that the court adjudged not that the plaintiff was entitled to no relief in equity from the legal effect of the release at law but that some paper never seen by the decreeing judge is decreed finally to be valid and binding (R. 40).

When in a court of law a plaintiff has alleged that he has executed no release valid in a court of law, and the defendant has alleged that the plaintiff has executed a release valid in a court of law, the issue so made should be decided in a court of law. The decision there may be because the plaintiff's evidence or the defendant's evi-

dence is inadmissible, or because the plaintiff's evidence or the defendant's evidence is insufficient to go to the jury, or because the jury has found one way or the other upon the evidence submitted to it.

It is respectfully submitted that the final decree (R. 40), the order (R. 38) denying the motion to vacate the order of transfer (R. 36), and the order of transfer (R. 30) granting the defendant's motion (R. 28), were errors and beyond the jurisdiction of the court.

SECOND

IF A PLAINTIFF'S SEAL ON THE RELEASE ON WHICH THE DEFENDANT RELIES PREVENTS A COURT OF LAW FROM HOLDING IT VOID OF FORCE IN A COURT OF LAW, THE PLAINTIFF IS ENTITLED TO TRIAL BY JURY AS TO WHETHER THE RELEASE ON WHICH THE DEFENDANT RELIES WAS SEALED BY THE PLAINTIFF.

It is submitted that this is a matter which is unnecessary for consideration because the preceding section by itself calls for the reversal or vacating of the order of transfer and of the subsequent orders in the District Court.

At some places in its brief, it appears to be the position of the defendant that a release not under seal may be attacked in a court of law but that a release under seal not obtained by overpowering physical duress must be enforced by a court of law and that therefore this case must be transferred to equity for a court of equity to determine whether or not, under the circumstances alleged, the release obtained in the manner alleged and its enforcement so far violate public policy and the text or policy of the antitrust laws that a court of equity will permit a court of law to respect public policy and the text and policy of the antitrust laws by declining to give effect to the release. If it is the law that a release not under seal may be attacked at law and one under seal may not be, a court of law cannot lawfully transfer the case to equity until the fact of seal or no seal has been determined in the court of law. On that issue the plaintiff had the right to trial by jury. The plaintiff has never waived trial by jury in this case but at all times has insisted on trial by jury (R. 41).

If the release on which the defendant relies is that contained in the formal license agreement (R. 42-52) the paper relied on appears to have on it the seal of Raytheon Manufacturing Company of Delaware which is the proprietor of the cause of action on which the Massachusetts corporation sues for the benefit of the Delaware corporation (R. 12). The corporation that sealed the release could not sue in its own name at law on the cause of action in suit which had accrued to the Massachusetts corporation. The paper does not bear the seal of the only nominal plaintiff that can maintain the action. The plaintiff is entitled to the verdict of a jury that this paper was not sealed by the plaintiff.

A principal is not liable under a sealed instrument unless he appears by its terms to be a party.

> *C. F. Starita Co., Inc.* v. *Compagnie Havraise Peninsulaire de Navigation a Vapeur*, (C.C.A. 2d-1931) 52 F. (2d) 58, 62.

The plaintiff is also entitled to have the jury, with proper instructions from the court after the evidence has been heard, pass on the question whether this release executed by the Delaware corporation manifested an intention to release the claim of the Massachusetts corporation. If it did not, the sealed paper is an immaterial paper.

If the release on which the defendant relies is the informal agreement (R. 52-54), the plaintiff is entitled to the verdict of a jury that this is not a paper under the seal of the plaintiff. It contains no language indicating an intention to have it a sealed agreement. The plaintiff was not a party to any sealed agreement. The fact that the name of one of the signers has a seal against it does not indicate any intention of the other signers to adopt

or to import a seal. It is common knowledge that papers are drawn preliminarily to have the signatures to them finally appear at the end in the order in which the names of the signers first appear in the instrument but that frequently the signatures are affixed in the proper place not in time order. There is no evidence that the seal of the General Electric Company was on the paper at any time of importance in determining the significance of the conduct of the plaintiff. There is no evidence that the plaintiff knew that General Electric Company was going to add a seal to its own name or even that the license was to bear seals. There is no evidence that D. T. Schultz had any authority to affix a seal of the plaintiff or to adopt another's seal as a seal of the plaintiff.

There has been a long-standing conception of the solemnity added to a document by a seal. There is nothing to indicate that Schultz added any such solemnity.

Decisions (*Jacksonville &c Railway* v. *Hooper*, 160 U. S. 514, 517) in which it has been held that where the paper recited that it was under seal it may be inferred that one party adopted the seal of another, have no bearing, because this paper purported to be a separate informal agreement not under seal. It did not purport to be a modification of the license of the same date. It was a separate agreement. It did not recite that it was sealed (R. 52-54). A signature to it raises no inference in fact or in law, of an intention to have the instrument a sealed instrument of the plaintiff.

If it is possible to say that by any implications the plaintiff sealed this instrument, certainly those implications could not be drawn from the face of the paper. It does not bear out such implications. The implications to be drawn from the affixing of Schultz's name cannot be determined without knowing the time, place, and cir-

cumstances which characterized the act. It is submitted that it is inconceivable that there could be any evidence that would warrant a jury in finding that this paper was sealed by the plaintiff, and certainly a jury could not make that finding without evidence.

Even if the instrument had purported to be intended as a sealed instrument, if in fact no one had been authorized to affix the plaintiff's seal to it, it did not become the sealed instrument of the plaintiff.

Barnet v. *Abbott*, (1880) 53 Vt. 120.

There is no implication of law that the paper was the sealed instrument of the plaintiff because of the fact that it bore the seal of another.

State of Maryland v. *Humbird*, (1880) 54 Md. 327.

If in fact the plaintiff did not adopt a seal, the paper did not become the sealed instrument of the plaintiff by operation of law.

"Aside from this, the most that can be urged is, that the adoption of the seal was a question of fact to be submitted to a jury, . . ."

Hess's Estate, 150 Pa. State, 346, 350.

If the right of the defendant to have this case transferred to equity depended on the fact of a seal, that fact must be determined by the verdict of a jury.

The plaintiff has not waived a jury at any time.

The declaration did not allege that the release was under seal (pars. 36, 37, R. 10, 21). The answer alleged that it was under seal (R. 28), and that it was an integral part of the license granted to the Raytheon Manufacturing Company (R. 31, lines 29-30, R. 32, line 19; R. 33,

line 15) of Delaware. This indicated that the defendant was alleging the formal license to that company. The informal agreement was no part of the integer.

By Massachusetts practice applied under the Conformity Act, the defendant's allegation of a seal is deemed denied without the need of a replication (*Mass. General Laws* (Ter. *ed.* 1932), c. 231, s. 34), namely:—"Any new matter in avoidance of the action which the answer contains shall be considered to be denied by the plaintiff without a replication, unless the court, upon motion of the defendant, requires him to reply thereto, and to state what part, if any, he admits or denies."

An examination of the license to the Delaware corporation (R. 42, 50, 52) shows that it had as "an integral" part of the paper a release by the Delaware corporation. It had no other release as an integral part of it.

The Court of Appeals, sitting on an appeal in equity with the powers of that position as to facts, finds the fact to be that "an examination of the release discloses that there is no seal set opposite the signature of the plaintiff" (R. 72, lines 6-7).

The record contains no finding of fact that the plaintiff has adopted a seal or that the plaintiff has executed a release under seal. At no stage has any evidence been introduced on which any such finding could be made.

For the purposes of decision the Court of Appeals assumed, without evidence, that the judge of the District Court had treated the release as under seal and that plaintiff's counsel raised no question to the contrary. The assumption was not of consequence in view of the decision of the Circuit Court of Appeals; but it is respectfully submitted that the record does not warrant this assumption. There is nothing in the record to indicate how Judge Lowell reached his conclusion, or that he did

not reach his conclusion that the case should be transferred by ruling as a matter of law that as the action was for the benefit of the Delaware corporation the sealed release by the Delaware corporation operated to release the claim of the Massachusetts corporation, or by ruling as a matter of law that the case ought to be transferred irrespective of whether or not the release was under seal. Certainly, in view of the care taken to show by bill of exceptions that Judge Lowell had acted without evidence (R. 41, line 10), no assumption should be made that he made an unwarranted finding of fact.

If the plaintiff's seal is a prerequisite to the defendant's right to have the question of the validity of the release transferred to equity for trial, no such transfer should be made until a jury has decided that the release bore the seal of the plaintiff. It did not, in fact.

For this reason it is respectfully submitted that the order of transfer was erroneous and beyond the jurisdiction of the court.

THIRD

A RELEASE UNDER SEAL MAY BE HELD VOID FOR ENFORCEMENT BY A COURT OF LAW ON THE FACTS ALLEGED BY THE PLAINTIFF AND NOT YET HEARD BY ANY COURT.

As no trial or hearing of facts has been had, and as no evidence has been heard, the case is here on the allegations of the pleadings.

The plaintiff's allegation is that the plaintiff has never executed a valid release (R. 10, 21). The defendant's allegation is, that the plaintiff for a good and valuable consideration released the defendant and that said release was under seal (R. 28). Under the Massachusetts practice applied under the Conformity Act, the plaintiff is deemed, without the filing of any replication, to have denied these allegations of the defendant (*Mass. General Laws (Ter. ed. 1932)*, c. 231, s. 34), supra p. 22.

It is respectfully submitted that even if the defendant establishes in a court of law the controverted allegations that the release was for a good consideration, and for a valuable consideration, and was under seal, the plaintiff has the right to prove in a court of law the plaintiff's allegation (R. 10, 21), that the plaintiff has never executed a valid release.

This allegation is not limited in any way. It permits the introduction of evidence that the defendant itself was the one that affixed the name of the plaintiff or a seal to a purported release. It permits the showing of any ground of invalidity. It is broad enough to permit the introduction of evidence much more extensive than properly can be paraphrased even, in a pleading. The declaration contains a brief outline of some of the grounds of invalidity (R. 4-10, 14-20).

The defendant, when engaged in interstate and foreign commerce in different kinds of radio apparatus and in radio communication, formed the plan and conspired to suppress, restrict and destroy all competition of others in this commerce. This was not limited to tubes, or to sets, or to any other department. It related to this entire branch of commerce (R. 4). At the time, there were a large number of others engaged in this commerce in competition with the defendant and there was then an established prospect of a substantial expansion of this competition.

For the above purpose the defendant conspired with independent competitors to acquire their competitive rights including patent rights on competitive devices, and by this means the defendant obtained a complete monopoly of vendable radio receiving sets, and by reason thereof it exerted by its illegal acts, an illegal duress upon all those engaged in this branch of interstate commerce so that they were compelled to deal with the defendant and upon such terms as the defendant dictated. As a result of this mastery the defendant prceeded to acquire a monopoly of the commerce in radio receiving set tubes. One of the means to this end was to compel those who desired to obtain rights to manufacture and sell radio receiving sets, to enter into an illegally restrictive agreement, in substance and in practical effect upon condition to acquire tubes from the defendant only. In this way, the defendant expanded its monopoly of receiving sets, also to tubes. The monopoly of this entire commerce in radio apparatus was illegal, and effective. As a result, the plaintiff, not because of any economic pressure, as is argued for the defendant, but because of this illegal continuing monopolization of both and all departments of this commerce, was forced to execute a purported

release of claims to the defendant which was in fact void (R. 10, 21). The plaintiff did not, as alleged by the defendant (R. 28), receive either a good or a valuable consideration for this release. It was given for nothing. It was not a release given pursuant to a settlement of a disputable or disputed liability. The case is before the court on the allegations. They show a clear liability. No settlement of it was made. Nothing was paid the plaintiff for the release. The informal agreement (R. 10, 21, 52) shows that it was not intended as a release pursuant to a settlement. It was understood that the claim should remain open, unsatisfied in any part, and to be enforced on stated conditions.

If the court should enforce this release, it would deprive the plaintiff, without any consideration, of capital assets of a value of more than $9,000,000. Such a crippling of a competitor would go far toward cementing for all time the defendant's monopoly of tubes, of sets, and of all departments of this commerce, and toward depriving this commerce of any possibility of a non-tribute-paying operation.

The allegation is not that the license is unlawful. The release of all claims is not essential to the effectiveness or to the operation of the license. No such question is presented as that on which courts may have differed in such decisions as *Columbia Pictures Corporation* v. *Bi-Metallic Inv. Co.*, (D.C. Colo.—1930) 42 F. (2d) 873, and *Fox Film Corporation* v. *Muller*, (Minn.—1935) 255 N. W. 845, 260 N. W. 320, certiorari granted June 3, 1935, 55 Supreme Court Reporter, 924—No. 47 October Term 1935. The royalty paid by the licensee is the full equivalent of any patent right, if any, used by the licensee. The defendant is compensated fully and in the intended way, for this use and at the defendant's established rate

to others. The plaintiff has paid in full in royalties for the commodity received. Beyond and apart from this, the release, if the court assists the defendant to enforce it, is a misappropriation of the competitor's capital in return for nothing, an act wholly unnecessary to the license. It is a most effective weapon, if the court supports its validity, to end all possibility of competition in any department of this commerce and to insure the perfecting of this monopoly in all departments of it. It helps directly to maintain the monopoly. Preventing this monopoly violating the Anti-Trust Acts is "the dominant public interest" (*Steele* v. *Drummond*, 275 U. S. 199, 205) which constrains the court not to become a party to perpetuating this unlawful monopoly by enforcing the release. If the plaintiff has the upwards of $9,000,000 to which it is entitled, the public interests may have again the advantages of this competition.

The license, unless extended, was to terminate on January 1, 1934. (R. 50). The plaintiff if then possessed of more than $9,000,000 of additional capital, would be in a much more effective position to break the defendant's monopoly of all departments of this commerce and to restore to the public the advantages of competition therein.

The question, then, is, whether a court of law of the United States, without equity powers, is compelled to assist the wrongdoer by enforcing this release against the plaintiff and so to join in the subjugation of this competitor and in depriving the public of the benefits of this competition. This is the direct effect of the defendant's plan.

Evidently it is unnecessary to consider at this stage whether or not these facts constitute a good attack upon the release. The reason if any for transfer to equity is

that these facts, if proved, do constitute in equity a good attack upon the release. If they do not constitute a good attack in equity upon the release, there is no occasion for invoking equitable powers. It is to be assumed, therefore, that these facts, if proved, do constitute a good attack in equity upon the release. If so, and it be assumed for the moment that the equity powers of the United States courts were taken away, is there any principle that compels a court of law of the United States to give its assistance to the wrongdoer in the subjugation of the competitor, notwithstanding these facts, by enforcing the release, for this purpose, admittedly an inequitable release? It is submitted that there is no such principle.

The defendant says that a court of law must assist the wrongdoer in this case to deprive the public of the opportunity for effective competition, because the paper had a seal on it. No cases have been cited in support of such a proposition.

In *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 241, 258, 260, the court, before declining its assistance, gave no consideration to whether or not the vicious contract was under seal. Granted that the making of the contract so far violates the Anti-Trust Acts that a court of equity will relieve against its enforcement, it is submitted that it is inconceivable that a court of law will insist on its enforcement by treating it as a bar at law, merely because it has a seal on it.

A sealed instrument should not be deemed in a court of law, any more impregnable than a payment of money.

If a payment of money is made under the compulsion of an illegal exaction, it may be recovered in an action at law.

Union Pacific Railroad Co. v. *Public Service Commission of Missouri*, 248 U. S. 67.

For a court of law to hold a release void, does not differ from its holding that money paid involuntarily can be recovered. One judgment holds void the apparent voluntariness of the payment of the money. The other holds void the apparent voluntariness of the execution of the release.

The brief for the defendant in this case seems to concede the applicability of the decisions as to instruments under seal which have been obtained by fraudulent inducements. These cases, if applicable, establish that there was no jurisdiction in equity in the case at bar.

In *Adamos* v. *New York Life Insurance Co.*, 293 U. S. 386, the court, without reference to the question whether or not the contract was under seal, held that a transfer to equity of the defence of fraudulent inducements to its making, was error and that the decree in equity for the cancellation of the contract should be reversed because the defence was fully available in the action at law. In *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379, the court points out more extensively that in determining whether a defence is legal or equitable "the test under § 274b is whether the defendant could have maintained a bill in equity on the same averments. The unequivocal language of the provision leaves no room for the argument that the substantive jurisdiction of equity was sought to be changed or enlarged" (383). . . . "In such a case, the defense of fraud is completely available in the action at law and a bill in equity would not lie to stay proceedings in that action in order to have the defense heard and determined in equity. *Insurance Co.* v. *Bailey*, 13 Wall. 616, 623; *Life Insurance Co.* v. *Bangs*,

103 U. S. 780, 782; *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288, 305; *American Mills Co.* v. *American Surety Co.*, 260 U. S. 360, 363; *New York Life Ins. Co.* v. *Marshall*, 23 F. (2d) 225; *New York Life Ins. Co.* v. *Miller, supra.* Respondent [defendant] was in no better position under § 274b" (385). The court recognizes that there may be a right in equity where no action at law has been brought, in which to plead the fraud (384).

It is not to be supposed that the court would have refrained from mentioning that the contract was not under seal if that had been thought important.

The opinion in *Cable* v. *U. S. Life Ins. Co.*, contains no intimation that the decision is rested on the fact that the insurance policy was not under seal. It is cited above in *Enelow* v. *N. Y. Life Ins. Co.* in association with *American Mills Co.* v. *American Surety Co.*, a case in which the instrument was under seal.

There is no basis for distinguishing between an insurance policy, and a release as to its contestibility in a pending action at law.

If after the plaintiff at bar brought this action, and after the defendant had pleaded the release so that the issue was drawn at law, the plaintiff had brought a bill in equity to have the release cancelled because initially void and without consideration, it is submitted that the court would have dismissed the bill because the plaintiff had a plain, adequate, and complete remedy at law.

In *American Mills Co.* v. *American Surety Co. of New York*, 260 U. S. 360, 363, the court held that but for a waiver of the objection such a bill could not be maintained to cancel a guaranty bond **under seal** for fraudulent representations inducing its execution. The printed record shows the seal (p. 40, 247). The report of the same case in the Circuit Court of Appeals for the Second

Circuit (273 Fed. 67) shows that the instrument was under seal.

It is significant that this opinion was written by Mr. Chief Justice Taft who, twenty-four years before, had written the opinion in *Wagner* v. *National Life Ins. Co.*, (C.C.A. 6th-1898) 90 Fed. 395, 404, in which the court said: — "Our conclusion is, therefore, that it is proper in a suit at law for the plaintiff to meet a plea of release by a replication that the release was obtained by fraud, whether the fraud is in the execution, or in misrepresentation as to material facts inducing execution. We are glad to come to this conclusion, because it avoids circuity of action, and thus facilitates the administration of justice." In this conclusion, no distinction is made between a release not under seal and a release under seal. The opinion as a whole (399-404) shows that no distinction is intended and that the conclusion is meant to cover releases under seal as well as those not. The opinion gives elaborate consideration to prior decisions in England and in the United States. It draws attention to the distinction between a release under seal and one not. It calls attention to the fact that courts of law have gone farther in permitting the defeat at law for fraud of releases under seal, than of other specialties (401). No one reading the opinion can doubt that Mr. Chief Justice Taft when he wrote the decision in *American Mills Co.* v. *American Surety Co.* had formed the opinion at least twenty-four years before that a release even under seal could be avoided in a court of law without recourse to equity, by showing that its execution had been induced by false and fraudulent representations even falling short of those which would have sustained a plea of *non est factum*. Whether the court entertained the view that the statement in *George* v. *Tate*, 102 U. S. 564, 570, was not

the law, or that a distinction was to be made between a bond and a release, the opinion does not indicate. Notwithstanding what was said in that case, the natural significance of the opinion in *American Mills Co.* v. *American Surety Co.* written by the one who had considered the subject so thoroughly in *Wagner* v. *National Life Insurance Co.*, clearly is that fraud may be set up at law even if the instrument is under seal. It was in a case in which the instrument before the court was under seal.

In *Union Pacific Railway Co.* v. *Harris*, 158 U. S. 326, the court held that a replication to a release was good at law although it set up not only the temporary lack of contractual capacity in the plaintiff but also misrepresentation and fraud (330).

It is believed that since the decision in *American Mills Co.* v. *American Surety Co.* no Circuit Court of Appeals, with consideration for that decision, has decided that either fraud or duress, even falling short of that which would sustain a plea of *non est factum*, was not a legal defense.

On the other hand, in *Fidelity & Casualty Co. of New York* v. *Glenn*, (C.C.A. 4th-1925) 3 F. (2d) 913, the court held that where the defendant, sued on a bond under seal, set up fraudulent representations, the parties were entitled to a jury trial and that it was proper to refuse to transfer the case to equity.

The decisions of the Circuit Courts of Appeals, which the defendant has cited, before the decision in *American Mills Company* v. *American Surety Company* deal indiscriminately with releases under seal and those not under seal. They were directly in conflict with the decision in *Wagner* v. *National Life Insurance Co., supra.* They were also in conflict with the decisions of the Supreme Court in *Insurance Co.* v. *Bailey, supra,* and

Cable v. *U. S. Life Insurance Co., supra,* unless it be the law that although an insurance policy may be defeated at law by the defense of fraudulent representations, a release even not under seal may not be. The argument for the defendant at other points appears to concede that a release not under seal may be defeated at law by showing fraudulent representations inducing its execution.

In view of what the Supreme Court has said already in the cases cited, a seal is not enough to change this result.

If the question were approached on principle, it is respectfully submitted that the result would be the same. A release is a self-executing contract to forgive a liability. If it is effective, it is a valuable thing. For the defendant to obtain that valuable thing from the plaintiff by deceit or by the exercise of unlawful power, is an actionable tort at law, to the plaintiff. The damages resulting from that tort are at least co-extensive with the value of the liability which is wiped out if the release is held effective. They would be recoverable in an action at law. Nothing is gained by this second action at law when the result can be accomplished by holding that a court of law will not enforce a release obtained in this way. No help from equity is needed. In the simple case of an indigent and ill-equipped plaintiff injured by a powerful defendant and then apparently deprived of his rights without any consideration by a release fraudulently obtained by the defendant's over-zealous and dishonest claim agent, it would be a most undesirable result to hold that the plaintiff could not have the valued trial by jury and that a court of law could render him no assistance. An unstilted common law designed for doing justice and not for the artistic play of wits, would never reach such a result.

When there is added, the feature that the Court is asked to enforce this release to destroy the capital assets

of a competitor as an intentional step to emphasize and to perpetuate a monopoly of commerce, there is reached the point where the Court is asked to violate the well-established principle that it will not give its assistance to the carrying out of an illegal plan. A contract which is contrary to public policy is to be treated not as voidable, but as void. (*West* v. *Camden*, 135 U. S. 507, 520. *Woodstock Iron Co.* v. *Richmond and Danville Extension Co.*, 129 U. S. 643.)

It is not, as argued for the defendant, that the plaintiff is contending that a monopoly is an outlaw whose contracts will not be enforced. Such decisions as *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165, *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, *Dennehy* v. *McNulta*, (C.C.A. 7th) 86 Fed. 825, certiorari denied 176 U. S. 683, *Columbia Pictures Corp.* v. *Bi-Metallic Inv. Co.*, (D.C. Colo.) 42 F. (2d) 873, *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, (D.C. Me.) 46 F. (2d) 511, 514, are not here questioned. No such contention is made. It is submitted only that a court of law will not assist a litigant in completing and in perpetuating an unlawful operation merely because a seal was put on the paper. *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 260, decides that the court will not give its assistance where the paper is not under seal. The later decisions do not question the correctness of this decision but, on the contrary, they recognize it. The demands of public policy are too important to be defeated by a wafer.

However, the question is not whether a court of law should refuse its assistance to the enforcement of this release. It is only, whether it is impotent to refuse to enforce it, without the help of a court of equity, so that

it is necessary to send the case there for a decree to permit the court of law to refuse to help to perpetuate the monopoly.

No such step is necessary or jurisdictionally permissible.

Respectfully submitted,

EDWARD F. McCLENNEN,
E. CURTISS MOWER, JR.,
EDWARD WILLIAMSON,
Attorneys for Respondent.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 127.—October Term, 1935.

Radio Corporation of America, Petitioner, *vs.* Raytheon Manufacturing Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[December 23, 1935.]

Mr. Justice Cardozo delivered the opinion of the Court.

The question is whether in the circumstances here exhibited the validity of a release pleaded by a defendant as a bar to a cause of action at law is triable in equity.

Plaintiff, respondent in this court, is a Massachusetts corporation, once known as Raytheon Manufacturing Company, now known as Raytheon, Inc. It sues for the benefit of Raytheon Manufacturing Company, a Delaware corporation, which by agreement is to receive the fruits of a recovery. The cause of action is under the anti-trust laws for treble the damages suffered by the plaintiff through a combination and monopoly in restraint of trade and commerce. 15 U. S. C., §§ 1, 2, 14, 15. The defendant, petitioner in this court, pleads as one of its defenses that after the cause of action had arisen the plaintiff without duress and for a valuable consideration signed and delivered to the defendant a general release under seal.

At this point there is need to recur to the allegations of the complaint. From them it appears that the defendant's monopoly became complete by the early part of 1928. The plaintiff's business had then been destroyed to its damage in excess of $3,000,000. "Wholly because of this destruction and of the illegal duress" imposed by the monopoly, the plaintiff and the Delaware corporation were compelled to seek and accept a license from the defendant and to execute a release. The complaint does not state whether the document was sealed. "The illegal duress aforesaid by the defendant rendered said release void, and the plaintiff has never executed a valid release of said claim." Moreover, there was an agreement upon "the execution of the void release" that its effect in stated contingencies was to be subject to exceptions. The

release was not to be pleaded as a bar if there was "pecuniary recognition" by the defendant of the rights of other claimants. Such "pecuniary recognition" there has been to the extent of $1,600,000, with the result that plaintiff may recover within that limit, even if not beyond. All this appears from the complaint with many amplifying statements unimportant here and now.

The issues being thus defined, the defendant moved upon the pleadings to transfer the case to equity for a preliminary hearing upon the validity of the release. This motion was granted against the plaintiff's opposition. Thereafter plaintiff moved to vacate or supersede the transfer, disclaiming "any right or remedy in this case, because of duress, to be relieved from such operation as said release would have at law had there been no duress."* This motion was denied. Thereafter plaintiff moved for a final decree dismissing it from equity, and reiterated its disclaimer of any right or remedy not belonging to it at law. This motion also was denied. At the same time a decree was entered at the instance of the defendant adjudging that the release as set forth in the defendant's answer was "valid and binding", and sending the case back to law for further proceedings. From the decree and the supporting orders there was an appeal by the plaintiff to the Circuit Court of Appeals for the First Circuit, where the decree and orders were reversed. 76 F. (2d) 943. The opinion covers a wide range. It considers the distinction between fraud in the "factum" and fraud in the "inducement" as affecting the power of a court of law to nullify a release not otherwise illegal, and the distinction for the same purpose between sealed and unsealed instruments. It suggests, without deciding, that the presence or absence of a seal, whatever significance may have attached thereto of old, has now ceased to be important. In the end it holds, however, that the release signed by the plaintiff was so connected with the unlawful combination and monopoly as to be inoperative at law,

*For greater certainty we add the next succeeding paragraph:

"Following this disclaimer, the issue, as to duress, for trial is whether the purported release which was obtained by the defendant from the plaintiff was originally obtained in fact by the duress of a power obtained by the defendant by unlawfully restraining interstate trade and substantially lessening competition therein by contract, combination or conspiracy or otherwise or by monopolizing or attempting to monopolize interstate trade in violation of Code of Laws of the United States, Title 15, Chapter 1, sections 1, 2 and 14, or any of them, and if so whether a court of law, not equity, of the United States will adjudge originally valid a release so obtained, notwithstanding such duress."

irrespective of the possibility of avoiding it in equity. A writ of certiorari issued to resolve a claim of conflict with decisions of this court.

The answer with its plea in bar will be searched in vain for the suggestion of an equitable defense. A release under seal is a good defense at law, unless its effect is overcome by new matter in avoidance. This will happen, for illustration, when it is so much a part of an illegal transaction as to be void in its inception. If it is subject to that taint, a court of law is competent to put it out of the way. We assume that a like competence exists in other circumstances. True there are times when a release, unassailable at law, is voidable in equity, and in equity only. If the plaintiff were demanding relief upon that basis, the equitable issue would have to be disposed of at the beginning. *American Mills Co.* v. *American Surety Co.*, 260 U. S. 360, 363; *Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235, 242; *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379, 383; *Adamos* v. *New York Life Insurance Co.*, 293 U. S. 386. With the parties so arrayed, the situation would be the same as if a bill in equity had been filed to set aside the release, the suitor thus removing a bar to a recovery. *Enelow* v. *New York Life Insurance Co., supra*, p. 382. But the plaintiff disclaims any title to relief upon that basis. It insists that the release is void at law on one or other of two grounds, either because not sealed by the maker, or because tainted with the same illegality as the illegal combination. It concedes here, as it did in the District Court, that if unable to prevail at law, it is unable to prevail anywhere. Before the days of equitable defenses no one would have insisted that a suitor who refused to file a bill in chancery could be sent there against his will. The only penalty for refusing to go would be the loss of any remedy peculiar to a court of equity. There is no other penalty now after the reforms of the Judicial Code. The defendant, setting up a legal defense, the bar of a release, would have us force upon the plaintiff an equitable replication which the plaintiff disavows. Accepting the disavowal, a court of equity must decline at this stage to adjudicate the validity of the release or its effect upon the parties, leaving that issue along with others to adjudication at law.

In thus delimiting the issues we delimit at the same time the scope of our decision. We do not attempt to say whether the release will collapse upon the showing of an illegal combination

or will retain an independent life. That is matter for the trial at law, where the bond between monopoly and surrender can be shown with certainty and fulness. Till then it will be best to put aside as premature not a little that is said in the opinion of the court below. Enough for present purposes that there are issues triable at law, and none triable in equity. We leave our ruling there.

The decree of the Circuit Court of Appeals is accordingly

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.